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Faithful Execution and Article II

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HARVARD LAW REVIEW

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ARTICLE

FAITHFUL EXECUTION AND ARTICLE II

Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman

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FAITHFUL EXECUTION AND ARTICLE II

Andrew Kent,* Ethan J. Leib** & Jed Handelsman Shugerman***

Article II of the U.S. Constitution twice imposes a duty of faithful execution on the President, who must “take Care that the Laws be faithfully executed” and take an oath or affirmation to “faithfully execute the Office of President.” These Faithful Execution Clauses are cited often, but their background and original meaning have never been fully explored. Courts, the executive branch, and many scholars rely on one or both clauses as support for expansive views of presidential power, for example, to go beyond standing law to defend the nation in emergencies; to withhold documents from Congress or the courts; or to refuse to fully execute statutes on grounds of unconstitutionality or for policy reasons.

This Article is the first to explore the textual roots of these clauses from the time of Magna Carta and medieval England, through colonial America, and up through the Philadelphia Convention and ratification debates. We find that the language of “faithful execution” was for centuries before 1787 very commonly associated with the performance of public and private offices — especially those in which the officer had some control over the public fisc. “Faithful execution” language applied not only to senior government officials but to a vast number of more ministerial officers, too. We contend that it imposed three interrelated requirements on officeholders: (1) a duty not to act ultra vires, beyond the scope of one’s office; (2) a duty not to misuse an office’s funds or take unauthorized profits; and (3) diligent, careful, good faith, honest, and impartial execution of law or office.

These three duties of fidelity look a lot like fiduciary duties in modern private law. This “fiduciary” reading of the original meaning of the Faithful Execution Clauses might have important implications in modern constitutional law. Our history supports readings of Article II of the Constitution, for example, that limit Presidents to exercise their power in good faith, for the public interest, and not for reasons of self-dealing, self-protection, or other bad faith, personal purposes. So understood, Article II may thus place some limits on the pardon and removal authority. The history we present also supports readings of Article II that tend to subordinate presidential power to congressional direction, limiting presidential non-enforcement of statutes, and perhaps constraining agencies’ interpretations of statutes to pursue Congress’s objectives. Our conclusions undermine imperial and prerogative claims for the presidency, claims that are sometimes, in our estimation, improperly traced to dimensions of the clauses requiring the President’s faithful execution.

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*** Professor of Law, Fordham University School of Law. This article benefitted greatly from presentations at the Columbia Law School Legal History Workshop, NYU School of Law Legal History Colloquium, Originalism Works-in-Progress Conference at the University of San Diego School of Law, National Conference of Constitutional Law Scholars at the University of Arizona Law School, Georgetown Advanced Constitutional Law Seminar, and faculty workshops at Fordham and the University of Pennsylvania Law School/Wharton Legal Studies Department. Thanks to the organizers and participants in those conferences and workshops. For helpful comments and discussions, thanks also to Nestor Davidson, Martin Flaherty, Jonathan Gienapp, David Golove, Philip Hamburger, John Harrison, Daniel Hulsebosch, Aziz Huq, Sophia Lee, Thomas Lee, Serena Mayeri, Michael McConnell, Bernadette Meyler, John Mikhail, Julian Mortenson, William Nelson, Victoria Nourse, Richard Primus, Michael Rappaport, Stephen Sachs, Matthew Stephenson, and William Treanor. We also thank John Shaw and Fordham librarians Janet Kearney and Gail McDonald for their research assistance.

INTRODUCTION

The faithfulness of a President to the Constitution, the laws, and the ideals and traditions of the United States is at issue as never before. The American people today are confronted with questions that go to the foundations of our constitutional system as a “government of laws, and not of men”¹ (or women). Presidential powers previously understood as plenary are being used in ways that many see as destructive of constitutional principles and norms. May a President fire senior law enforcement personnel, if the purpose is to protect himself or close associates from a criminal investigation? May a President use the pardon power or his control over classification and declassification of information for the same purposes? Does the Constitution have a plan for when it appears that a President may be motivated not by a view of the public good but by self-regarding or bad faith purposes?

We think that two frequently cited but poorly understood parts of the Constitution speak to these questions. Article II of the U.S. Constitution twice imposes a duty of faithful execution on the President, who must “take Care that the Laws be faithfully executed”² and take an oath or affirmation to “faithfully execute the Office of President.”³ Although other public servants are “bound by Oath or Affirmation[] to support [the] Constitution,”⁴ no other officeholder has the same constitutional command of fidelity. And the language of faith appears nowhere else in the document, save the requirement that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”⁵

The two clauses requiring faithful execution look somewhat different from each other. One is a straightforward legal command — albeit using the passive voice — imposing a duty throughout tenure in office with respect to the laws. The other requires a promissory oath or affirmation with respect to the office, a single-occasion speech act with, in Anglo-American culture, a heavily religious flavor, notwithstanding the

¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The phrase is older. See, e.g., JOHN ADAMS, NOVANGLUS; OR, A HISTORY OF THE DISPUTE WITH AMERICA, FROM ITS ORIGIN, IN 1754, TO THE PRESENT TIME, NO. VII (1775), reprinted in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 220, 226 (C. Bradley Thompson ed., 2000) [hereinafter ADAMS WRITINGS] (“Aristotle, Livy, and Harrington . . . define a republic to be a *government of laws, and not of men*.”).

² U.S. CONST. art. II, § 3.

³ *Id.* § 1. We are not the first to note that these two clauses share the element of faithful execution. See, e.g., Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1771–72 (2016); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261 (1994); David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 907–08 (2016); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1629–30 (2008).

⁴ U.S. CONST. art. VI, cl. 3.

⁵ *Id.* art. IV, § 1.

Constitution's command that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."⁶ Edward Coke, the seventeenth-century jurist revered by many American framers,⁷ wrote that an oath necessarily involves "calling Almighty God to witnesse."⁸

Over the centuries, the two Faithful Execution Clauses have produced wide-ranging jurisprudences and have been marshaled in many constitutional debates. The President's oath, often in combination with the so-called Take Care Clause, is invoked by participants in debates about the power of the President not to enforce or defend congressional laws on the ground of unconstitutionality.⁹ Both clauses have been cited by the executive branch as supporting an executive privilege to withhold internal documents¹⁰ and an authority to go beyond or even defy standing law to protect the nation in emergencies.¹¹ The Supreme Court has

⁶ *Id.* art. VI, cl. 3.

⁷ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30–31, 177, 225 (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 1776–1787, at 138–43 (1969).

⁸ EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 164 (London, 1797) (1644). For an expression of this view by a prominent American lawyer at the Founding, see James Iredell, Address to the North Carolina Convention (July 30, 1788), in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 192, 196 (Jonathan Elliott ed., Washington, D.C., 1836) [hereinafter ELLIOTT]. At the time the Constitution was written, the affirmation option was not viewed as an accommodation for atheists or non-Christians — it was for most Americans unthinkable that such persons would hold public office. See MARC W. KRUMAN, *BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 47–49, 96–97 (1997) (discussing religious qualifications on officeholding in American states during the Founding era). Rather, the affirmation was an accommodation for Christians who belonged to Protestant sects (non-Anglican) that viewed oath-swearing as profane. See *infra* p. 2124. The No Religious Test Clause of the Constitution was understood to prohibit the kind of provisions found in Great Britain and some American states that required an oath or affirmation of orthodox Protestant Christian belief as a condition of holding office. See Note, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649, 1650–52 (2007).

⁹ See, e.g., Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31–33 (1992); AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 178–79 (2005); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 873–74 (1994); Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1195–96 (2012); Paulsen, *supra* note 3, at 261–62; Prakash, *supra* note 3.

¹⁰ See, e.g., Constitutionality of the OLC Reporting Act of 2008, 32 Op. O.L.C. 14, 16–17 (2008); Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act, 10 Op. O.L.C. 68, 79 (1986).

¹¹ See, e.g., Brief for Petitioner at 2–4, 27–28, 98–100, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 745); First Inaugural Address — First Edition and Revisions (Mar. 4, 1861), in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 249, 253 (Roy P. Basler ed., 1953); see also Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257–58 (2004) (locating in the Presidential Oath Clause and constitutional structure "an overriding principle of constitutional and national self-preservation . . . that may even, in cases of extraordinary necessity, trump specific constitutional requirements").

agreed with the less aggressive proposition that the Take Care Clause, together with other parts of Article II, conveys a large measure of authority to defend the government and interests of the United States in the absence of standing law.¹²

The Take Care Clause is also part of the justifications for, among other things, the President's unfettered ability to remove the heads of at least some types of executive agencies;¹³ federal courts' strict requirement of Article III standing, limiting Congress's ability to grant broad citizen standing;¹⁴ and presidentially imposed oversight of agency rule-making, such as mandatory cost-benefit analysis.¹⁵ Proponents of prosecutorial discretion as within the province of the Executive invoke the Take Care Clause,¹⁶ as do participants in related debates about policy-based nonenforcement or suspension of statutes,¹⁷ and presidential impoundment of appropriated funds.¹⁸ Most concede that the clause's imposition of a duty to execute law implies that the President cannot make law,¹⁹ but some argue that it allows presidential "completion" of incomplete statutory regimes.²⁰

¹² See *In re Neagle*, 135 U.S. 1, 63–64 (1890).

¹³ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010); *Myers v. United States*, 272 U.S. 52, 117 (1926); see also *Suspension of Officer*, 18 Op. Att'y Gen. 318, 319 (1885) (citing the Presidential Oath Clause as well).

¹⁴ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992); *Allen v. Wright*, 468 U.S. 737, 761 (1984); *FEC v. Akins*, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting).

¹⁵ See, e.g., Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2295–96 (2006) (discussing Executive Order No. 12,291, 3 C.F.R. 128 (1981), and Executive Order No. 12,866, 3 C.F.R. 638 (1993)).

¹⁶ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

¹⁷ See, e.g., *Texas v. United States*, 86 F. Supp. 3d 591, 614 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam) (presidential authority for a deferred action immigration program); SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 92–97 (2015) (exploring whether the "Faithful Execution Clause" was written to bar suspensions and dispensations); MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 124 (2007) (suggesting that the Take Care Clause bars the suspension power claimed by English monarchs); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (arguing "that the Constitution's Take Care Clause imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases. In other words . . . there is simply no general presidential nonenforcement power"); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1878 (2015) (arguing that "the [Take Care] Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power"); cf. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 70 (D.D.C. 2015) (addressing whether "the Executive was unfaithful" to the ACA).

¹⁸ See, e.g., Neil M. Soltman, Recent Development, *The Limits of Executive Power: Impoundment of Funds*, 23 CATH. U. L. REV. 359, 366–67 (1973).

¹⁹ See, e.g., *Medellin v. Texas*, 552 U.S. 491, 532 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

²⁰ See, e.g., Goldsmith & Manning, *supra* note 15, at 2303–04.

And in recent shorter works, we have suggested that the Take Care Clause and Presidential Oath Clause also speak to contemporary controversies about President Trump's use of the pardon power²¹ and his control over removal of officers in the Department of Justice.²²

Notwithstanding all of these claims about the clauses by the Executive, courts, and scholars, no one has actually figured out where the clauses came from or what they were understood to mean when they were drafted and adopted.²³ Writing about the Take Care Clause, but making a point that applies to the Presidential Oath Clause as well, Professors John Manning and Jack Goldsmith note that the Supreme Court tends to "treat[] the meaning . . . as obvious when it is anything but that," and fails to "parse the text" or "examine the clause's historical provenance."²⁴ Little was said explicitly during the Philadelphia Convention or the ratification debates in the states about the Faithful Execution Clauses,²⁵ but some scholars have noted that the Take Care Clause mirrors language found in the post-independence constitutions of Vermont, New York, and Pennsylvania, and a frame of government for colonial Pennsylvania.²⁶ Still, essentially nothing has yet been discovered or written about the origin and historical meaning of the "faithful execution" language they share.

This Article, then, is the first substantial effort to pursue the historical origins of the twin commands of faithful execution²⁷ and to link

²¹ See Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Two Legal Conclusions*, 16 GEO. J.L. & PUB. POL'Y (forthcoming 2019) (manuscript at 111–13) (on file with the Harvard Law School Library); Andrew Kent, Ethan Leib & Jed Shugerman, *Self-Pardons, Constitutional History, and Article II*, TAKE CARE BLOG (June 16, 2018), <https://takecareblog.com/blog/self-pardons-constitutional-history-and-article-ii> [<https://perma.cc/SR2S-UTX7>]; Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST (Mar. 14, 2018), <http://wapo.st/2pdoIzK> [<https://perma.cc/48ZB-YSPE>].

²² Ethan J. Leib & Jed Shugerman, *Mueller's Recourse*, SLATE (Mar. 19, 2018), <https://slate.com/news-and-politics/2018/03/if-a-trump-official-fires-the-special-counsel-to-protect-trump-mueller-can-sue-to-keep-his-job.html> [<https://perma.cc/2C66-WG6H>].

²³ See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 & n.9 (2016).

²⁴ *Id.* at 1838.

²⁵ See *infra* sections I.A–B, pp. 2121–32; see also MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH 107 (1999) ("The wording of [the] oath occasioned little serious discussion during the Constitutional Convention."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 63 (1994) ("[A]t the founding, the [Take Care Clause] received relatively little consideration by practically everyone in the debate.").

²⁶ See *infra* notes 297, 374 & 377–378 and accompanying text; see also PRAKASH, *supra* note 17, at 96 (noting the linguistic similarities); Bellia, *supra* note 3, at 1174 n.118 (same); Delahunty & Yoo, *supra* note 17, at 802–03 (same); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 693 n.75 (2014) (same).

²⁷ But see Ryan S. Killian, Faithfully Interpreting "Faithfully" (Feb. 17, 2014) (unpublished manuscript) (on file with the Harvard Law School Library) (concluding in a short essay drawing upon

these findings to the original meaning of Article II.²⁸ We do not enter the debates about how heavily originalist findings should ultimately weigh in the calculus of contemporary constitutional meaning, or about the best form of originalism. We are satisfied that our archaeological project here is justified by the fact that all, or nearly all, constitutional interpreters consider original textual meaning, informed by historical context, to be an important factor in constitutional interpretation,²⁹ and that all, or nearly all, varieties of originalists will find our methods reasonable.³⁰

So what does our new history show? The Faithful Execution Clauses are linked not only by common words, but also by a common historical purpose: to limit the discretion of public officials. The language of “faithful execution” at the time of the framing was very commonly associated with the performance of public and private offices — especially but by no means only those in which the officer had some control over the public fisc. The drafters at Philadelphia did not *ex nihilo* come up with the idea of having a chief magistrate who would take an oath of

contemporaneous usage that “faithful execution” was a “boilerplate term of art,” *id.* at 10, but also an example of the “‘anti-corruption principle’ animating the Constitution,” *id.* at 12).

²⁸ A search for original public meaning of the Constitution’s text is currently the most widely accepted form of originalist inquiry. This method is sometimes also called “new originalism,” “new textualism,” or other names. It seeks to discern, as of the time of ratification of the constitutional text, “the meaning actually communicated to the public by the words on the page.” Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 413 (2013); *see also* Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 759 (2013) (stating that new originalism seeks to find “the objective linguistic meaning that the text of the Constitution would likely have had to an American audience at the time of adoption”).

²⁹ *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8 (1982); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1798–800 (1997); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244–45, 1252–58 (1987).

³⁰ Because we present overwhelming evidence that the Faithful Execution Clauses were written in the language of the law, *but see* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1371 n.229 (2018) (finding the Take Care Clause to be ambiguous rather than purely in the language of the law), “original methods” originalists will be able to interpret the clauses as lawyers at the time of the Founding would have understood their technical meanings. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751–52 (2009). Moreover, because we show that the concept of faithful execution of office was so commonly used and well known, other public meaning originalists who seek to discern how informed lay people would have understood the Constitution should find our results valuable too. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 92 (2004) (looking to the “meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment”); Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 975 (2008) (discussing “educated and informed speakers of the time”). Finally, because most of the important drafters of the Constitution were lawyers or at least literate in law and government, *see Meet the Framers of the Constitution*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/NMJ4-JJ7D>], originalists who focus on the intentions of the drafters should find our research about the legal and political meaning of “faithful execution” useful.

faithful execution and be bound to follow and execute legal authority faithfully. The models were everywhere. Governors of American colonies pre-independence, post-independence state governors, executive officers under the Articles of Confederation government, and other executives such as mayors and governors of corporations were required, before entering office, to take an oath for the due or faithful execution of their office. These officials were directed to follow the standing law and stay within their limited authority as they executed their offices — just as the British monarch was by an oath taken at coronation. Anyone experienced in law or government in 1787 would have been aware of this because it was so basic to what we might call the law of executive officeholding.

Yet one of our most interesting findings here is that commands of faithful execution with duties that parallel Article II applied not only to senior government officials who might have been plausible models for the presidency in Article II, but also to a vast number of less significant officers. It turns out that the U.S. President, who today bestrides the globe in the world's most powerful office, has the commands of fidelity with antecedents dating back centuries in humble offices like town constable, weigher of bricks, vestryman of the church, recorder of deeds, and inspector of flax and hemp. In fact, this history shows that the framers did not borrow the language of the English coronation oaths (which did not include the word “faithful” or its synonyms), but instead borrowed from the “faithfulness” oaths of midlevel or lower offices. This, we argue, has historical and legal implications for debates among proponents of royalist and republican understandings of the presidency.³¹

As we will trace below, this imposition of a duty of fidelity on officers — through oaths and otherwise — by the time of the framing had three basic components or substantive meanings. Our first finding, consistent with usage reported in contemporaneous dictionaries, is that faithful execution was repeatedly associated in statutes and other legal documents with true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office. Second, the faithful execution duty was often imposed to prevent officeholders from misappropriating profits that the discretion inherent in their offices might afford them. Third, the duty was imposed because of a concern that officers might act *ultra vires*; the duty of faithful execution helped the officeholder internalize the obligation to obey the law, instrument, instruction, charter, or authorization that created the officer's power.

³¹ Compare PRAKASH, *supra* note 17, and ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING (2014), with Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. (forthcoming 2019) (manuscript on file with authors).

What these three aspects of the duty of fidelity have in common is that they look a lot like *fiduciary* duties in the private law as they are understood today.³² The word “fiduciary” is derived from the Latin “fides,” meaning “faith,” and from “fiducia,” meaning “in trust”³³ or a “position of trust” or “confidence.”³⁴ Although decades of scholarship have traced the idea of public offices as “trusts” — private law fiduciary instruments — from Plato through Cicero and Locke,³⁵ and several scholars have found ways to make points of contact between that tradition and our constitutional tradition,³⁶ the Faithful Execution Clauses are substantial textual and historical commitments to what we would today call fiduciary obligations of the President. We do not claim that the drafters at Philadelphia took ready-made fiduciary law off the shelf and wrote it into Article II. But we do assert that the best historical understanding of the meaning of the Faithful Execution Clauses is that they impose duties that we today — and some in the eighteenth century as well — would call fiduciary.

Our narrative history takes the following form: Part I retells the story of the role of the Faithful Execution Clauses at the Constitutional Convention and in the ratification debates in the states. We also pursue linguistic usage and social practice of the eighteenth century to clarify what the Founding generation would have thought was involved in swearing an oath or affirming to faithfully execute an office, and being commanded to ensure that the laws are faithfully executed. These traditional sources of original meaning remain insufficient, however.

Part II thus performs a deeper historical inquiry into the meaning of faithful execution in the centuries leading up to the framing of the U.S.

³² See Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1822 (2016).

³³ See *Fiduciary*, BLACK’S LAW DICTIONARY (9th ed. 2009); 1 BOUVIER LAW DICTIONARY 1075–76 (Stephen Michael Sheppard ed., 2012); 2 HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES 98 & n.2 (1902); THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 354 (C.T. Onions ed., 1966); ERNEST VINTER, A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS 1 (3d ed. 1955).

³⁴ *Fiduciary*, BLACK’S LAW DICTIONARY (9th ed. 2009); 2 ROBY, *supra* note 33, at 98 & n.2; VINTER, *supra* note 33, at 1; see OXFORD LATIN DICTIONARY (P.G.W. Glare ed., 2d ed. 2012).

³⁵ See J.W. GOUGH, JOHN LOCKE’S POLITICAL PHILOSOPHY 136 (2d ed. 1973); C.E. VAUGHAN, STUDIES IN THE HISTORY OF POLITICAL PHILOSOPHY 143–57 (1939); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Principles and Public Offices*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 303 (Evan Criddle et al. eds., 2019).

³⁶ See, e.g., GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION 33–34 (2017); Paul Finn, *The Forgotten “Trust”: The People and the State*, in EQUITY: ISSUES AND TRENDS 131, 131 (Malcolm Cope ed., 1995); Paul Finn, *Public Trust and Public Accountability*, 3 GRIFFITH L. REV. 224, 228 (1994); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1078–88 (2004) [hereinafter Natelson, *The Public Trust*]; Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 245 (2007) [hereinafter Natelson, *Judicial Review*]; Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 52–53 (2010) [hereinafter Natelson, *The Necessary and Proper Clause*].

Constitution. Our archaeology starts in English law in the period of Magna Carta and proceeds through the early modern era. We then explore the tumultuous seventeenth century of Stuart kings and two revolutions, where we can identify transitions in the meaning of “faithful execution” and the law of officeholding. We see this developed conception of faithful execution move through English law in Hanoverian Britain until 1787. We also focus attention on the other side of the Atlantic, studying North American colonial governments from their earliest days through the Revolution of 1776. We then examine post-independence governance in the U.S. states and at the national level under the Continental/Confederation Congress. On both sides of the Atlantic, then, we reveal oaths, commands, and bonds of faithfulness that have for centuries in the Anglo-American tradition applied to executive officers. We delineate which offices were given these duties of loyalty — and how the demand of faithfulness developed over time.

We then take these histories together in Part III to sketch an account of what the Faithful Execution Clauses in the U.S. Constitution would likely have been understood to mean in 1787. Our history supports readings of Article II of the Constitution that limit Presidents to exercise their power only when it is motivated in the public interest rather than in their private self-interest, consistent with fiduciary obligation in the private law. It also supports readings of Article II that tend to subordinate presidential power to congressional direction, requiring the President to follow the laws, instructions, and authorizations set in motion by the legislature. As a corollary, these conclusions tend to undermine imperial and prerogative claims for the presidency, claims that are sometimes, in our estimation, improperly traced to dimensions of the Take Care and Presidential Oath Clauses. What judicial precedent or historical “gloss”³⁷ after 1787 adds to the meaning of “faithful execution” is beyond the scope of our investigation here. But we think our historical reconstruction has continued relevance to ongoing debates about Article II.

It is, ultimately, not easy to know how to enforce the constitutional obligations we uncover. The correct method of interpreting and applying the Constitution in the present day is endlessly contested, because it is unclear how to evaluate a President’s subjective motives and what to do about mixed motive cases.³⁸ Moreover, the enforcement mechanisms we found for commands of faithful execution run the gamut from judicial enforcement via damages, fines, injunctions, bond forfeiture, and criminal penalties, to impeachment and removal from office. But on the substance of the President’s faithful execution duties in Article II, we

³⁷ See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413 (2012).

³⁸ For a recent example of these difficulties, see the conflicting views in the briefs and opinions of the Justices in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the travel ban case; and see also Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1108–14 (2018).

conclude that their original meaning includes at least 1) a strong concern about avoiding ultra vires action; 2) proscriptions against profit, bad faith, and self-dealing; and 3) a duty of diligence and carefulness.

I. FAITHFUL EXECUTION IN 1787–1788: EVIDENCE FROM THE CONVENTION, RATIFICATION, AND LINGUISTIC USAGE

The primary sources for discovering the original meaning of the Constitution — the records of debates about the framing and ratification of the Constitution, and documents evidencing contemporary linguistic usage, such as dictionaries — provide only some assistance with uncovering the meaning of the Faithful Execution Clauses. We briefly explore these sources here, both to emphasize some new findings and to motivate the need for deeper historical investigation. We also address the meaning of three other components of the clauses: the command to “take Care,”³⁹ just what counts as “the Laws,”⁴⁰ and the aspect of the presidential oath promising to “preserve, protect and defend the Constitution.”⁴¹

A. *The Philadelphia Convention*

It is widely accepted that many delegates arrived in Philadelphia in the spring of 1787 convinced that the national government needed a strong executive.⁴² The government under the Articles of Confederation produced legislative resolves that were nominally binding on the states, but there were no means of enforcement, making them in practice precatory. After a few years of chaotic execution through ad hoc delegation and temporary committees, Congress placed management of war, diplomacy, public funds, and a postal system first in standing committees and then national-level officers or small departments answering directly to the Congress.⁴³ But the Continental Congress was a large multimember body with frequently changing membership,⁴⁴ meaning that executive management lacked stability, unity, efficiency, and secrecy.

The experience under post-independence state constitutions also convinced many Philadelphia Convention delegates and other nationalists that a strong executive was important to political stability. The new

³⁹ U.S. CONST. art. II, § 3.

⁴⁰ *Id.*

⁴¹ *Id.* § 1.

⁴² See, e.g., FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 150–53, 160–63 (1994); CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 65–70 (Liberty Fund 2007) (1923).

⁴³ See, e.g., EDMUND CODY BURNETT, *THE CONTINENTAL CONGRESS* 118–21, 488–92 (W.W. Norton & Co. 1964) (1941); JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 193–203, 282–84 (1979); JENNINGS B. SANDERS, *EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS, 1774–1789*, at 70–71 (1935).

⁴⁴ See RAKOVE, *supra* note 43, at 198.

constitutions showed what Thomas Jefferson later called “jealousies of . . . executive Magistrate[s].”⁴⁵ The legislatures dominated these governments. Many governors were selected by state legislatures; most had short terms, restrictions on reeligibility, and shared executive authority with a governing council.⁴⁶ Historians have traced how the lone early constitution with a strong executive — New York’s 1777 document — and the 1780 Massachusetts Constitution largely drafted by John Adams,⁴⁷ a believer in vigorous executive power, came to be seen as models for many Philadelphia framers because of concerns about legislative abuses and the need for an executive counterweight who would also vigorously execute the laws.⁴⁸

Of course there were some who resisted a strong national executive, believing that fidelity to principles of the Revolution and republicanism mandated that, in Roger Sherman’s words to his Philadelphia colleagues, the Executive should be “nothing more” than an agent “for carrying the will of the Legislature” into effect,⁴⁹ and should be “absolutely dependent on that body.”⁵⁰

As a result, there was vigorous disagreement at Philadelphia between people holding views like Sherman’s and the proponents of an independent, powerful Executive — men like James Wilson, Gouverneur Morris, and Alexander Hamilton.⁵¹ They battled over whether the Executive would be single or plural; whether the Executive would be selected by the legislature or have an independent electoral base; whether the Executive should have a substantial salary; and whether the Executive would have elements of the old royal prerogative such as a veto over legislation or any ability to pardon.⁵² We accept historians’ accounts of determined contestation at Philadelphia over these issues and a final result in which

⁴⁵ THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON 1, 112 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1892).

⁴⁶ THACH, *supra* note 42, at 16–17; see also, e.g., WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 270–72 (Rita & Robert Kimber trans., Rowman & Littlefield Publishers 2001) (1973); MCDONALD, *supra* note 42, at 130–35; RICHARD B. MORRIS, THE FORGING OF THE UNION 1781–1789, at 123–25 (1987); WOOD, *supra* note 7, at 138–43.

⁴⁷ See JOHN ADAMS, *The Report of a Constitution, or Form of Government, for the Commonwealth of Massachusetts*, in ADAMS WRITINGS, *supra* note 1, at 295, 296.

⁴⁸ See, e.g., ADAMS, *supra* note 46, at 294; THACH, *supra* note 42, at 76; WOOD, *supra* note 7, at 403–09, 431–36.

⁴⁹ James Madison, Notes on the Constitutional Convention (June 1, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64, 65 (Max Farrand ed. 1911) [hereinafter FARRAND’S RECORDS].

⁵⁰ *Id.* at 68.

⁵¹ See, e.g., THACH, *supra* note 42, at 65–123.

⁵² MORRIS, *supra* note 46, at 287–91; PRAKASH, *supra* note 17, at 54–55; THACH, *supra* note 42, at 65–123.

the proponents of a strong Executive — desiring to preserve the structural unity and some powers of the British monarchy — got much but not all of what they wanted.⁵³

In comparison, the disputes were mild with regard to the components of Article II central to our project. The Virginia Plan, presented at the outset of the Convention in May by the Virginia delegation — which included James Madison, George Washington, and Edmund Randolph⁵⁴ — proposed “a National Executive be instituted . . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.”⁵⁵ Adopted by the Convention as a basis for its opening discussions,⁵⁶ this plan proposed an oath for state officers, binding them to support the national government,⁵⁷ but contained no oath for national officials. Debate revealed that many but not all delegates believed that oaths were an important security that could help hold officers to their duty.⁵⁸ A decade before, Revolutionary War leaders had confronted the problem that they and their soldiers were all legally committing treason against Britain, and they had no basis for requiring loyalty to the Continental Army and the nascent state and national governments.⁵⁹ They turned to loyalty oaths as a legal solution, with more success for officers and soldiers than for the general populace.⁶⁰ By 1778, each state had a loyalty oath,⁶¹ and it was unsurprising that Philadelphia delegates adopted a similar safeguard.

⁵³ See, e.g., MCDONALD, *supra* note 42, at 160–81. While Professor Eric Nelson’s account of the Convention debates about Article II aligns broadly with what we summarize in the main text, see NELSON, *supra* note 31, at 184–226, we think he sometimes over-reads — as a desire for monarchy — the views of Americans who desired only that the national chief executive have certain monarchical features or powers, such as the veto on legislation. See, e.g., *id.* at 222–24 (discussing aspects of Alexander Hamilton’s views on executive power that had attributes in common with royal prerogative).

⁵⁴ Journal of the Constitutional Convention (May 25, 1787), in 1 FARRAND’S RECORDS, *supra* note 49, at 1.

⁵⁵ James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 49, at 17, 21.

⁵⁶ *Id.* at 23.

⁵⁷ *Id.* at 22 (“Resd. that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union[.]”).

⁵⁸ James Madison, Notes on the Constitutional Convention (June 11, 1787), in 1 FARRAND’S RECORDS, *supra* note 49, at 196, 203 (Edmund Randolph); James Madison, Notes on the Constitutional Convention (July 11, 1787), in 1 FARRAND’S RECORDS, *supra* note 49, at 578, 583–84 (Gouverneur Morris); James Madison, Notes on the Constitutional Convention (July 23, 1787), in 2 FARRAND’S RECORDS, *supra* note 49, at 87, 87 (Elbridge Gerry).

⁵⁹ HAROLD M. HYMAN, TO TRY MEN’S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 73 (1959).

⁶⁰ See *id.* at 79–84.

⁶¹ *Id.* at 85.

Some delegates, like Wilson, voiced doubts about the efficacy of government-mandated oaths, however.⁶² As discussed in Part II below, oaths were used for centuries by the English state — and continued to be used at the time the U.S. Constitution was written — to exclude Catholics and dissenting (non-Anglican) Protestants from public office, to formally mandate allegiance to the Crown, and to assert royal control over church affairs. They were thus heartily disliked by many religious minorities. Wilson was born into a Presbyterian Scottish family and may have learned early that religious test oaths were oppressive.⁶³ In addition, some Protestant sects — including some Presbyterians and most Quakers, who were a large and powerful group in Pennsylvania (Wilson's adopted home state) — refused oaths because they found them to be a profane taking of the Lord's name in vain.⁶⁴ But the supporters of oaths in the Constitution greatly outnumbered opponents at Philadelphia.⁶⁵ Given the ubiquity of oaths of office in Anglo-American law, and widespread agreement that they should be included in the Constitution, it seems that many statesmen at the end of the eighteenth century still agreed with an earlier seventeenth-century author that an oath was "the safest knot of civil society, and the firmest band to tie all men to the performance of their several duties."⁶⁶

Early in the Convention, the delegates took several votes that suggested a rejection of a presidency with broad prerogative powers over legislation. James Wilson's proposal for an absolute veto, for example, was decisively rejected,⁶⁷ as was an ambiguous proposal by Pierce Butler to grant the President some kind of suspending or temporary veto

⁶² James Madison, Notes on the Constitutional Convention (July 23, 1787), *supra* note 58, at 87.

⁶³ See CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798, at 7–8 (1956); Alasdair Raffe, *Scottish State Oaths and the Revolution of 1688–1690*, in SCOTLAND IN THE AGE OF TWO REVOLUTIONS 181–82 (Sharon Adams & Julian Goodare eds., 2014) (discussing Scottish Presbyterian objections to the religious test oaths).

⁶⁴ These Protestant sects cited several parts of the New Testament, including the Sermon on the Mount. See *Matthew* 5:33–37 (King James) ("Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: but I say unto you, Swear not at all; neither by heaven; for it is God's throne: nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil."). But other Christians disagreed: "They noted that *Matthew* 5 could not be taken literally since God commanded his people to swear in the Old Testament (*Deut.* 6:13, 10:20) and the apostle Paul swore in his epistles (*Rom.* 9:1, *Gal.* 1:20, *Phil.* 1:8)." JONATHAN MICHAEL GRAY, OATHS AND THE ENGLISH REFORMATION 17 (2013).

⁶⁵ James Madison, Notes on the Constitutional Convention (July 23, 1787), *supra* note 58, at 88 (resolution on oaths adopted "nem. con." — without dissent); *Journal* (Aug. 27, 1787), in 2 FARRAND'S RECORDS, *supra* note 49, at 422, 427 (presidential oath vote: 7 ayes; 1 no; 2 absent).

⁶⁶ J.C.D. Clark, *Religion and Political Identity: Samuel Johnson as a Nonjuror*, in SAMUEL JOHNSON IN HISTORICAL CONTEXT 79, 81 (Jonathan Clark & Howard Erskine-Hill eds., 2002) (quoting THE CASE OF CONCEALMENT OR MENTALL RESERVATION (1614)).

⁶⁷ See James Madison, Notes on the Constitutional Convention (June 4, 1787), in 1 FARRAND'S RECORDS, *supra* note 49, at 96, 98, 103. Ten states voted against, and none voted for it. *Id.* at 103.

power.⁶⁸ These early decisions make it unlikely that the later additions of the Take Care Clause and the oath could have been understood as resurrecting any kind of a suspension power, a power withheld from the monarchy for a century by the time of the Convention.⁶⁹

An amended Virginia Plan on June 13 contained a chief magistrate “with power to carry into execution the National Laws . . . [and] removable on impeachment and conviction of mal practice or neglect of duty.”⁷⁰ William Paterson for New Jersey introduced an alternate plan with a structurally weaker Executive, but one that still had “general authority to execute the federal acts.”⁷¹ Hamilton proposed an elected “Governour” who would “serve during good behaviour,” and “have . . . the execution of all laws passed.”⁷² There was no oath for the chief magistrate and nothing resembling the Take Care Clause.

In late July, a Committee of Detail was formed to produce a draft constitution based on the votes and discussions that had occurred to date.⁷³ The Committee was chaired by John Rutledge of South Carolina and included Randolph, Oliver Ellsworth of Connecticut, Wilson, and Nathaniel Gorham of Massachusetts.⁷⁴ Both Faithful Execution Clauses — the President’s oath of office and the Take Care Clause — emerged during this process from a draft by Wilson, edited by Rutledge.⁷⁵ Wilson and Rutledge agreed that the draft should read: “The Executive Power of the United States shall be vested in a single Person. His Stile shall be, ‘The President of the United States of America.’”⁷⁶ They also agreed on an oath: “Before he shall enter on the Duties of his Department, he shall take the following Oath or Affirmation, ‘I — solemnly swear, — or affirm, — that I will faithfully execute the Office of President of the United States of America.’”⁷⁷

⁶⁸ See *id.* at 103–04; see also Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 215, 222 (2015) (discussing Butler’s proposal).

⁶⁹ See PRAKASH, *supra* note 17, at 93–94 (acknowledging that “a few delegates favored [temporary suspensions]” but also emphasizing that “the state delegations unanimously rejected the idea” and that the “Crown had lacked these powers for almost a century”).

⁷⁰ The Virginia Plan as Amended in Committee (June 13, 1787), in 1 FARRAND’S RECORDS, *supra* note 49, at 228, 230.

⁷¹ James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 49, at 242, 244.

⁷² James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 FARRAND’S RECORDS, *supra* note 49, at 282, 292. Hamilton’s longer outline from September reflecting the final draft has sometimes been mistakenly attributed to this June debate. The editor of Hamilton’s papers estimated the date of this outline was around September 17, as the Convention was nearing completion. See 4 THE PAPERS OF ALEXANDER HAMILTON 253 & n.2 (Harold C. Syrett ed., 1962).

⁷³ William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 202 (2012).

⁷⁴ *Id.* at 202, 214.

⁷⁵ Report of Committee of Detail, IX, in 2 FARRAND’S RECORDS, *supra* note 49, at 163 n.17.

⁷⁶ *Id.* at 171.

⁷⁷ *Id.* at 172 (one set of internal quotation marks omitted).

There was some difference about the wording of what would become the Take Care Clause. Wilson wrote, likely borrowing directly from his home state's constitution and William Penn's famous charter⁷⁸: "He shall take Care to the best of his Ability, that the Laws of the United States be faithfully executed."⁷⁹ Rutledge edited this to read: "It shall be his duty to provide for the due & faithful exec — of the Laws of the United States to the best of his ability."⁸⁰ The Committee of Detail reported a version that hewed closer to Wilson's, stating that the President "shall take care that the laws of the United States be duly and faithfully executed."⁸¹ Both versions — by use of the passive voice in Wilson's formulation and by referring to a "duty to provide for" in Rutledge's — seem to convey that the President would have an oversight role, making certain that other officials faithfully execute the laws.⁸² But this does not exclude direct law execution by the President, especially since "the executive power" was vested in this office by the first sentence of Article II.⁸³ The conceptions of the office of President all seem to contemplate that the laws to be executed would include, at a minimum — and perhaps at a maximum — acts of the national legislature.⁸⁴

After more debate, and an addition to the presidential oath of "preserve protect and defend" language on motion of Madison and George Mason,⁸⁵ a Committee of Style was commissioned to produce a new draft.⁸⁶ In early September, the Committee — comprised of Hamilton, William Johnson of Connecticut, Rufus King of Massachusetts, Madison, and Gouverneur Morris — issued a draft with the following language:

Before he enter on the execution of his office, he shall take the following oath or affirmation: "I — , do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my judgment and power, preserve, protect and defend the constitution of the United States." . . . [H]e shall take care that the laws be faithfully executed . . .⁸⁷

⁷⁸ See sources cited *infra* notes 297 & 374.

⁷⁹ Report of Committee of Detail, IX, *supra* note 75, at 171 (annotations omitted); see *id.* at 163 n.17 (identifying the annotations used to note editing of the text).

⁸⁰ *Id.* at 163; see *id.* at 163 n.17 and accompanying text (on authorship of Wilson and Rutledge).

⁸¹ James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 FARRAND'S RECORDS, *supra* note 49, at 177, 185.

⁸² See, e.g., Metzger, *supra* note 17, at 1875–76 (making this point about the "take care" formulation).

⁸³ U.S. CONST. art. II, § 1, cl. 1. But the English monarch did not have authority to personally, directly execute the laws, see *infra* note 423 and accompanying text, a state of affairs that may be reflected in the passive voice of the Take Care Clause.

⁸⁴ See *supra* notes 67–72 and *infra* section I.D.2, pp. 2136–37.

⁸⁵ James Madison, Notes on the Constitutional Convention (Aug. 27, 1787), in 2 FARRAND'S RECORDS, *supra* note 49, at 426, 427.

⁸⁶ Journal of the Constitutional Convention (Sept. 8, 1787), in 2 FARRAND'S RECORDS, *supra* note 49, at 544, 547.

⁸⁷ Report of Committee of Style (Sept. 12, 1787), in 2 FARRAND'S RECORDS, *supra* note 49, at 590, 599–600; see also *id.* at 590 n.8.

Two changes of interest were made before the faithful execution provisions were finalized. First, the Committee of Style deleted “duly and” before “faithfully” in the Take Care Clause, seemingly because duly executing was redundant with faithfully executing.⁸⁸ And on September 15, the Convention Journal reflects that the oath was changed so that the President did not promise to use his or her “best . . . judgment and power,” but rather “the best of [his or her] ability.”⁸⁹ Convention notes do not reveal the reason for this change, but it does seem to eliminate some discretion by removing the words “judgment” and “power” and emphasizing instead a need for diligence and effort.

From the outset of its drafting, the presidential oath allowed affirming rather than swearing, showing that the framers were sensitive to the views of Protestant sects (such as the Quakers) who viewed oath-taking as profane. Also notable is the clause that ended up in Article VI that, while requiring all officers under the United States “be bound by oath or affirmation, to support the Constitution,” banned any “religious test” for those officers⁹⁰ — a short sentence that swept away centuries of English practice that had limited the holding of important government offices to people who would swear allegiance to and take the sacraments of the established Anglican Church.

Taking an oath of office was both commonplace and significant. In seventeenth-century England — even before the massive growth of government and offices of the eighteenth century⁹¹ — about one-twentieth of adult males held public office in a given year, and potentially about one-half did so in a given decade.⁹² Nearly all of these offices — whether constable, bailiff, alderman, recorder, ale taster, or something else — would have required oaths upon entry.⁹³ At the same time, one oath of office in particular had enormous constitutional importance for the country. The coronation oath, in which the new king or queen was

⁸⁸ Compare *id.* at 599 (omitting “duly”), with Proceedings of Convention Referred to the Committee of Style and Arrangement (Sept. 10, 1787), in 2 FARRAND’S RECORDS, *supra* note 49, at 565, 574 (previous version with “duly”). For a caution against relying too heavily on the surviving records of the Convention, see MARY SARAH BILDER, MADISON’S HAND *passim* (2015).

⁸⁹ Journal of the Constitutional Convention (Sept. 15, 1787), in 2 FARRAND’S RECORDS, *supra* note 49, at 621.

⁹⁰ U.S. CONST. art. VI, cl. 3.

⁹¹ See MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 64–65 (2003).

⁹² See Mark Goldie, *The Unacknowledged Republic: Officeholding in Early Modern England*, in THE POLITICS OF THE EXCLUDED, C. 1500–1800, at 153, 161 (Tim Harris ed., 2001).

⁹³ See sources cited *infra* notes 214–227; see also EDWARD VALLANCE, REVOLUTIONARY ENGLAND AND THE NATIONAL COVENANT: STATE OATHS, PROTESTANTISM AND THE POLITICAL NATION, 1553–1682, at 17, 19 (2005) (“By the end of the sixteenth century, England had turned into a nation in which mass oath taking was an almost customary part of political life . . .” *Id.* at 17. “The lowliest of occupations could carry an oath of office, binding the swearer to fulfil their duties. Midwives, forest rangers and ale tasters, along with lord lieutenants and judges, swore to faithfully serve the crown or the parish.” *Id.* at 19.).

required to pledge to govern according to law, was a conceptual key to England's uniquely limited monarchy.⁹⁴ As we explore below, the drafters, notably, did not borrow language from the coronation oath but rather from the oaths of lesser officers, which frequently invoked faithful execution.

There was a “dog that didn’t bark” at the Philadelphia Convention. In the recorded debates, we find almost no one arguing that either of the Faithful Execution Clauses somehow empower the President. Instead, the clauses were discussed as duties or restrictions. Legal scholarship has often overemphasized oaths as the basis for powers,⁹⁵ framed most famously by Chief Justice Marshall’s invocation of his oath in *Marbury v. Madison*⁹⁶ to underwrite the Court’s power of judicial review.⁹⁷ But the framing records, as well as prior history, reflect a belief that oaths were instead discretion-limiting, with significant binding effect in legal or political terms. Even Wilson, who was skeptical of oaths’ efficacy, acknowledged that he “was afraid they might too much trammel the Members of the Existing Govt in case future alterations should be necessary; and prove an obstacle” to amending the Constitution.⁹⁸ As Wilson recognized, many people in the eighteenth century viewed oath-swearing as a solemn and momentous event with real binding power over men’s souls and hence their actions as well.

B. Ratification Debates

As at Philadelphia, divergent views about the proper structure and power of a national Executive emerged during the ratification process in state conventions.⁹⁹ But there was little discussion of the Faithful Execution Clauses, and neither clause generated any sustained controversy. To the extent they were discussed, the clauses tended to be viewed as real limits on presidential power. In a *Federalist* essay, Madison wrote that “the executive magistracy is carefully limited . . . in the extent . . . of its power.”¹⁰⁰ Hamilton suggested in another Publius essay that, in the Take Care Clause, “the power of the President will resemble

⁹⁴ See MICHAEL J. BRADDICK, STATE FORMATION IN EARLY MODERN ENGLAND, C. 1550–1700, at 21–22 (2000); DAVID MARTIN JONES, CONSCIENCE AND ALLEGIANCE IN SEVENTEENTH CENTURY ENGLAND: THE POLITICAL SIGNIFICANCE OF OATHS AND ENGAGEMENTS 19 (1999); VALLANCE, *supra* note 93, at 19; see also *infra* notes 263–266 and accompanying text.

⁹⁵ See, e.g., Paulsen, *supra* note 3, at 257–62.

⁹⁶ 5 U.S. (1 Cranch) 137, 180 (1803).

⁹⁷ See, e.g., Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387, 403–04 (2003); Paulsen, *supra* note 3, at 272. The better reading is probably that Chief Justice Marshall invoked the oath to frame judicial review as an unavoidable duty and responsibility, not a power.

⁹⁸ James Madison, Notes on the Constitutional Convention (July 23, 1787), *supra* note 58, at 87.

⁹⁹ See, e.g., PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 151, 189–90, 286, 371 (2010).

¹⁰⁰ THE FEDERALIST NO. 48, at 306 (James Madison) (Clinton Rossiter ed., 2003).

equally that of the king of Great Britain and of the governor of New York”¹⁰¹ — two officials who were bound by oath to follow and execute standing law and had no suspension authority. In a Virginia newspaper, “*Americanus*” ridiculed the claim that the President possessed “kingly” or “mighty powers,” suggesting the Take Care Clause specifically was not such a power.¹⁰² James Wilson, in the Pennsylvania ratifying convention, did state that the Take Care Clause was a “power of no small magnitude,” but that was in response to a claim that the President would be a mere “tool” of an overly powerful Senate.¹⁰³

At the Massachusetts ratifying convention, former governor James Bowdoin listed the Presidential Oath Clause as one of the “great checks” in the document against abuse of power.¹⁰⁴ “A Jerseyman” wrote in a Trenton newspaper that the presidential oath “guarded” against abuse of office.¹⁰⁵ “A Native of Virginia” published a pamphlet which called the oath “an additional check upon the President.”¹⁰⁶

Oaths of office in general were discussed as real and meaningful checks on official behavior by figures such as Hamilton in a *Federalist*

¹⁰¹ THE FEDERALIST NO. 69, *supra* note 100, at 416 (Alexander Hamilton).

¹⁰² *Americanus I*, VA. INDEP. CHRON., Dec. 5, 1787, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 203 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter DHRC].

¹⁰³ Statement of James Wilson at the Pennsylvania Ratifying Convention (Dec. 11, 1787), in 2 DHRC, *supra* note 102, at 550, 568. For more on Wilson’s complex views at the Pennsylvania Convention, see *infra* notes 121–123 and accompanying text.

¹⁰⁴ Statement of James Bowdoin at the Massachusetts Ratifying Convention (Jan. 23, 1788), in 6 DHRC, *supra* note 102, at 1321–22. *But see* Letter from William Symmes, Jr., to Peter Osgood, Jr. (Nov. 15, 1787), in 4 DHRC, *supra* note 102, at 236, 242. In this letter, an antifederalist delegate to the Massachusetts ratifying convention expressed concern that Article II was “so brief, so general,” that the “faithful execution” language was insufficiently clear to restrain or guide the President. *Id.* Symmes asked: “And should ye. Legislature direct ye. mode of executing ye. laws, or any particular law, is [the President] obliged to comply, if he does not think it will amount to a *faithful* execution?” *Id.* He concluded: “Doubtless it is a very good thing to have wholesome laws faithfully executed.—But where this power is given to a single person, it does not seem to me that either sufficient instructions, or a sufficient restraint, can be couched in two words.” *Id.* For further discussion of this letter, see Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 620–22 (1994); and Matthew Steil, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557, 631 n.269 (2018).

¹⁰⁵ A Jerseyman, *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, reprinted in 3 DHRC, *supra* note 102, at 146, 149. “A Jerseyman” added that “faithfully execute” meant a command of active execution. *Id.* Similarly, William Maclaine, a delegate in the North Carolina ratifying convention, described the Take Care Clause as one of the Constitution’s “best provisions,” because “[i]f [the President] takes care to see the laws faithfully executed, it will be more than is done in any government on the continent” Statement of William Maclaine at the North Carolina Ratifying Convention (July 28, 1788), in 4 ELLIOT, *supra* note 8, at 135, 136. Professors Steven Calabresi and Saikrishna Prakash suggest that Maclaine’s interpretation of the Take Care Clause “ensure[s] a vigorous execution of federal law” and “energetic presidential execution.” Calabresi & Prakash, *supra* note 104, at 617.

¹⁰⁶ A Native of Virginia, *Observations upon the Proposed Plan of Federal Government* (Apr. 2, 1788), in 9 DHRC, *supra* note 102, at 655, 680–81.

essay,¹⁰⁷ the influential essayist “Brutus” (likely Melancton Smith),¹⁰⁸ and others.¹⁰⁹ There was some, but not much dissent from that theme.¹¹⁰ And “no objection [was] made,” Hamilton wrote in another *Federalist* essay, “nor could [it] possibly admit of any,” to the requirement that the president faithfully execute the laws.¹¹¹

There was some dissent about the presidential oath because it was not religious enough. For example, a South Carolina pastor complained at that state’s ratification convention that the sacred, Christian character of the oaths of office was undermined by the No Religious Test Clause.¹¹² Similarly, Edmund Pendleton asked James Madison in a letter “why require an Oath from Public Officers, and yet interdict all Religious Tests, their only sanction.”¹¹³ He noted that “a belief of a Future State of Rewards & Punishments” is what “give[s] conscientious Obligation to Observe an Oath” of office.¹¹⁴ A few other people made similar points.¹¹⁵ Oliver Wolcott of Connecticut, on the other hand, told his state’s convention for ratifying the Constitution that an oath of office “is a direct appeal to that God who is the Avenger of Perjury. Such an appeal to Him is a full acknowledgment of His being and providence.”¹¹⁶

We found little evidence that either Faithful Execution Clause was viewed during ratification as allowing the President authority to suspend execution of the laws, whether based on his policy preferences or on his own interpretations of the Constitution, and a substantial amount of evidence cutting the other way. Pendleton, for example, wrote that the President would “hav[e] no latent Prerogatives, nor any Powers but

¹⁰⁷ THE FEDERALIST NO. 27, *supra* note 100, at 173 (Alexander Hamilton) (referencing “the sanctity of an oath” of office).

¹⁰⁸ Brutus VI, N.Y. J., Dec. 27, 1787, *reprinted in* 15 DHRC, *supra* note 102, at 110, 112 (lamenting that state government officials “will be subordinate to the general government, and engaged by oath to support it”); *see also* 13 DHRC, *supra* note 102, at 411.

¹⁰⁹ *See, e.g.*, Statement of John Smilie at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 DHRC, *supra* note 102, at 407, 410 (giving as one reason that the national government will be too powerful that “[o]aths [are] to be taken to the general government”).

¹¹⁰ *See* Statement of Benjamin Rush at the Pennsylvania Ratifying Convention (Nov. 30, 1787), *in* 2 DHRC, *supra* note 102, at 433, 433 (“The constitution of Pennsylvania, Mr. President, is guarded by an oath, which every man employed in the administration of the public business is compelled to take; and yet, sir, examine the proceedings of the Council of Censors and you will find innumerable instances of the violation of that constitution, committed equally by its friends and enemies.”).

¹¹¹ THE FEDERALIST NO. 77, *supra* note 100, at 462 (Alexander Hamilton).

¹¹² Statement of Francis Cummins at the South Carolina Ratifying Convention (May 20, 1788), *in* 27 DHRC, *supra* note 102, at 359, 359 n.2, 360.

¹¹³ Letter from Edmund Pendleton to James Madison (Oct. 8, 1787), *in* 10 DHRC, *supra* note 102, at 1770, 1774.

¹¹⁴ *Id.*

¹¹⁵ *See* MAIER, *supra* note 99, at 152.

¹¹⁶ *Convention Proceedings and Debates*, CONN. COURANT, Jan. 14, 1788 (statement of Oliver Wolcott), *reprinted in* 3 DHRC, *supra* note 102, at 554, 558.

such as are defined & given him by law.”¹¹⁷ An anonymous writer during the New Jersey and Pennsylvania conventions stated similarly that the Take Care Clause meant “complete execution,” and then included the oath of office as a further command for full execution.¹¹⁸ Other observers explained that “faithful execution” was a legal limitation on executive discretion. One writer, “Cassius” (James Sullivan, a Massachusetts lawyer, later the governor¹¹⁹), explained that the oath of faithful execution distinguished the President from a monarch, and that violation of it would “arrest[]” his career (civilly, not criminally) and be justiciable.¹²⁰ In ambiguous remarks at the Pennsylvania Ratifying Convention, Wilson might have endorsed some kind of presidential nonenforcement. Wilson stated that after being enacted, laws could not be left “a dead letter” but must be “honestly and faithfully executed.”¹²¹ But later in the same lengthy speech, after endorsing the power of judicial review of legislation, Wilson added, “[i]n the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.”¹²² Wilson did not tie this claim to any clause of the Constitution. Some scholars view this statement as a departmentalist assertion that the President could refuse to execute laws that he viewed as unconstitutional.¹²³ That may be right; but Wilson may instead have been referring to the President’s veto or pardon powers, the expressly enumerated methods for the President to disagree with Congress about the constitutionality (or wisdom) of legislation.

A number of writers and speakers during ratification seem to have understood the Take Care Clause’s reference to “laws” to mean statutes of Congress,¹²⁴ but whether it meant more than that was not expressly debated.

A final point of interest is that the ratification debates were filled with references to public offices as “trusts,”¹²⁵ and officers as “servants,”

¹¹⁷ Letter from Edmund Pendleton, *supra* note 113, at 1772.

¹¹⁸ A Jerseyman, *supra* note 105, at 148–49 (emphasis omitted).

¹¹⁹ 4 DHRC, *supra* note 102, at 30.

¹²⁰ Cassius VI, *To the Inhabitants of this State*, MASS. GAZETTE, Dec. 21, 1787, reprinted in 5 DHRC, *supra* note 102, at 500, 500 (“[I]nstead of the president’s being vested with all the powers of a monarch . . . he is under the immediate controul of the constitution, which if he should presume to deviate from, he would be immediately arrested in his career, and summoned to answer for his conduct before a federal court . . .”).

¹²¹ Statement of James Wilson at the Pennsylvania Ratifying Convention (Dec. 1, 1787), in 2 DHRC, *supra* note 102, at 448, 450.

¹²² *Id.* at 451.

¹²³ See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 920–22 (1990); see also Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U. L. REV. 735, 767–68 (1993).

¹²⁴ See, e.g., Statement of James Wilson, *supra* note 121, at 450; A Jerseyman, *supra* note 105, at 148–49.

¹²⁵ THE FEDERALIST NO. 57, *supra* note 100, at 348 (James Madison) (stating that rulers exercise a “public trust” for “the common good of the society”); Statement of Richard Harison at the

“agents,” “guardians,” or “trustees” of the people,¹²⁶ language that implied a special obligation by the officeholder to act for the benefit of the public, not himself personally.

C. *Linguistic Usage*

Neither the phrase “faithfully execute” nor its variants (such as “faithful execution”) is defined as a term of art in standard eighteenth-century legal dictionaries.¹²⁷ But general dictionaries did agree on the meaning of the component words — and, like the Convention and ratification evidence above, reinforce the narrative of “faithful execution” as limiting device.

In some contexts, the word “faithfully” had a religious significance, but there is no reason to think that was the sense in which it was used in the Constitution. According to Samuel Johnson’s dictionary, “faithfully” meant, in its nonreligious senses: “With strict adherence to duty . . . Without failure of performance . . . Sincerely; with strong promises . . . Honestly; without fraud . . . Confidently; steadily.”¹²⁸ Noah Webster’s first dictionary, which slightly postdates the framing period, defines faithfully as “honestly, sincerely, truly, steadily.”¹²⁹ Other dictionaries agree,¹³⁰ but with many omitting the usage as steadily or

New York Ratifying Convention, July 14, 1788, in 23 DHRC, *supra* note 102, at 2170, 2171 (calling the powers lodged in government officials by the proposed constitution “a sacred trust”).

¹²⁶ See, e.g., THE FEDERALIST NO. 40, *supra* note 100, at 251 (James Madison) (referring to the Constitution’s drafters as “confidential servants of their country”); THE FEDERALIST NO. 46, *supra* note 100, at 291 (James Madison) (“The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes.”); THE FEDERALIST NO. 49, *supra* note 100, at 313 (James Madison) (“The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.”); Statement of Edmund Pendleton at the Virginia Ratifying Convention (June 2, 1788), in 9 DHRC, *supra* note 102, at 910, 911 (referring to ratifying convention delegates as “[t]rustees”). One writer referred to the president as the “supreme conservator of laws.” *Republicus*, KY. GAZETTE, Mar. 1, 1788, reprinted in 8 DHRC, *supra* note 102, at 448.

¹²⁷ See, e.g., 2 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW (London, E. & R. Nutt & R. Gosling 1736); 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY (London, A. Strahan & W. Woodfall 1792); JOHN COWEL & THO. MANLEY, THE INTERPRETER OF WORDS AND TERMS, USED EITHER IN THE COMMON OR STATUTE LAWS OF THIS REALM, AND IN TENURES AND JOCULAR CUSTOMS (London, 1701); 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW (London, His Majesty’s Law Printers 2d ed. 1771); GILES JACOB, A NEW LAW-DICTIONARY (London, W. Strahan & W. Woodfall 10th ed. 1782).

¹²⁸ 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 7th ed. 1783).

¹²⁹ NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 112 (New Haven, Sidney’s Press 1806).

¹³⁰ See, e.g., 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly 1775) (“with strict adherence to duty; sincerely, honestly, steadily, confidently”); FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (London, 1772) (“With strict adherence to duty, loyalty, and the discharge of any obligation or promise. Honestly, or without fraud. Fervently, earnestly, confidently.”); WILLIAM CRAKELT, ENTICK’S NEW

confidently, and focusing on the meaning as sincerely, honestly, or true to one's trust or duty.¹³¹ In a vast number of English and colonial legal precedents imposing oaths for faithful execution or directions to faithfully execute,¹³² faithfulness is described as a "duty" being owed to a "trust" or to the intent and meaning of a law or other legal directive. Steadiness has resonance, too, because — as we will discuss — "diligently" was frequently used alongside faithfully to describe how officers should execute their office or laws.

To execute something meant in the eighteenth century, as it does today, to carry out or put into effect or force, to enforce, to administer.¹³³ The oath requires the President to faithfully execute the office of the President. Implementing and carrying out the duties of the presidency, then, are what must be done faithfully. The Take Care Clause requires the President to faithfully execute "the laws" — to put them into force and effect. We discuss below whether "the laws" includes only statutes of Congress, or perhaps also the Constitution, international law, or various types of common law.

We note, before proceeding to other parts of the Faithful Execution Clauses, that the history we present below about their meaning supports and is supported by recent work of Professor Julian Mortenson on the meaning of the "executive Power" vested in the President by the first sentence of Article II.¹³⁴ Rejecting the prominent claim that this Executive Vesting Clause conveys a residuum of all domestic and foreign affairs prerogatives held by the British Crown, unless expressly vested elsewhere by the Constitution,¹³⁵ Mortenson shows convincingly that this opening clause of Article II would have been understood at the framing to vest merely a power to execute the law — a power that was inherently

SPELLING DICTIONARY 143 (London, Charles Dilly 1788) ("sincerely, honestly, truly, steadily"); WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 234 (Worcester, Mass., Isaiah Thomas 1st Am. ed. 1788) ("honestly, sincerely; steadily"); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia, William Young 4th ed. 1789) ("with strict adherence to duty; sincerely; honestly; confidently, steadily").

¹³¹ See, e.g., NATHAN BAILEY, DICTIONARIUM BRITANNICUM OR A MORE COMPLETE UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, T. Cox 2d ed. 1736) ("honestly, sincerely, trustily"); DANIEL BELLAMY, A NEW, COMPLETE, AND UNIVERSAL ENGLISH DICTIONARY (London, J. Fuller 4th ed. 1764) (faithful: "loyal, just, upright, honest, sincere; true to one's trust"); A GENERAL AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Peacock 1785) ("sincerely, honestly").

¹³² See *infra* Part II, pp. 2141–78.

¹³³ Mortenson, *supra* note 31 (manuscript at 91–96).

¹³⁴ U.S. CONST. art. II, § 1, cl. 1; see Mortenson, *supra* note 31.

¹³⁵ See, e.g., Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2098–99 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252–56 (2001).

subordinate to legislative authority.¹³⁶ Both of these histories of linguistic use, therefore, emphasize the republican rather than the royal or imperial core of America's chief executive.

D. The Other Components of the Clauses

Each of the clauses imposing faithful execution obligations contains additional language that could affect its meaning. Based on historical research, we have concluded as follows.

1. *"Take Care."* — The original meaning of "take care" is relatively clear. A "take care" command is found in a vast number of legal documents in the centuries before 1787. In those contexts, "take care" was a directive from a superior to an agent, directing that special attention be paid to ensure that a command or duty was carried out. This usage is found in everything from corporate charters for businesses¹³⁷ and colonial settlements,¹³⁸ to orders of the Crown issued to colonial governors¹³⁹ and other officials,¹⁴⁰ to statutory commands to officers and statutory definitions of duties of an office,¹⁴¹ to directives of

¹³⁶ See Mortenson, *supra* note 31 (manuscript at 63–72).

¹³⁷ See, e.g., Grant of London Goldwire drawers, Patent Rolls, 21 Jac. I, pt. ii (June 14, 1623), in 28 THE PUBLICATIONS OF THE SELDEN SOCIETY: SELECT CHARTERS OF TRADING COMPANIES, A.D. 1530–1707, at 122, 132 (Cecil T. Carr ed., 1913) (providing an oath be administered to the governor of the corporation that he "take care (so far as in you lieth) that provision of bullion be duly made and brought in bonâ fide from foreign parts" (emphasis removed)).

¹³⁸ See, e.g., The Charter of Massachusetts Bay (1629), reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 1846, 1852 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (directing that the governor and other corporate officers "shall applie themselves to take Care for the best disposing and ordering of the generall buysines and Affaires" of the colony and company). The 1663 Charter for Rhode Island contained the same provision. Rhode Island Charter Granted by King Charles II (July 8, 1663), at 2, reprinted in LIBRARY OF CONGRESS <https://www.loc.gov/resource/rbpe.16400100/?sp=1&st=text> [<https://perma.cc/72ZN-FQEH>].

¹³⁹ See, e.g., 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670–1776 § 78, at 43–44 (Leonard Woods Labaree ed., 1935) [hereinafter LABAREE] (noting instruction to the governor of Virginia that "you are to take care that the Oaths of Obedience and Supremacy be administered to all persons whatsoever that bear any part of the government").

¹⁴⁰ See, e.g., The Earl of Nottingham to the Commissioners of the Great Seal (May 13, 1689), in CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM AND MARY, 13TH FEB. 1689–APRIL 1690, at 102, 102 (William John Hardy ed., London, Eyre and Spottiswoode 1895) ("[H]is Majesty would have you take care that the rule heretofore observed by former Lord Chancellors or Lord Keepers, as to the payment of those fees before the passing of the patent, be punctually kept on all other occasions, without any variation from it.").

¹⁴¹ See, e.g., An Act for the More Effectuall Suppression of Piracy 1698/99, 11 Will. 3 c. 7, § 6 (providing that the register of an ad hoc admiralty court for trying pirates "shall prepare all Warrants and Articles and take care to provide all Things requisite for any Tryall according to the substantiall and essentiall Parts of Proceedings in a Court of Admiralty"); An Act for the Laying Out, Regulating, Clearing, and Preserving Publick Common High-ways Throughout this Colony, reprinted in ACTS OF ASSEMBLY, PASSED IN THE PROVINCE OF NEW-YORK, FROM 1691, TO 1718, at 66, 68 (London, John Baskett 1719) (directing surveyors and commissioners "to take Care

the Continental Congress,¹⁴² and military orders of General George Washington.¹⁴³ As noted above, a directive that magistrates “take care” that laws be faithfully executed was found in the postindependence constitutions of Vermont, New York, and Pennsylvania, and in a frame of government for colonial Pennsylvania from the 1680s.¹⁴⁴

Descriptions of law execution power in both legal and popular sources sometimes also used the formulation.¹⁴⁵ For example, a proclamation of James I against the sale of foreign tobacco noted “that such person or persons, whom Wee shall appoint, specially by Our Privie Seale, to take care and charge of the execution of Our pleasure in the premisses, shall have the one halfe of all the Fines, to bee imposed upon

that this Act, and every Clause, Matter, and Thing in the same contained, be duly, truly, and effectually performed, done, and put in Execution”; An Act for Amending, Explaining and Reducing into One Act of Parliament, the Laws Relating to the Government of His Majesty’s Ships, Vessels and Forces by Sea 1748/49, 22 Geo. 2 c. 33, *reprinted in* 1 THE LAWS, ORDINANCES, AND INSTITUTIONS OF THE ADMIRALTY OF GREAT BRITAIN, CIVIL AND MILITARY 539–40 (London, His Majesty’s Law-Printers 1767) (excerpting a statute providing that “[a]ll Commanders and Officers of his Majesty’s Ships of War . . . shall take Care that Prayers and Preaching by the Chaplains of the Ships be performed diligently; and that the Lord’s Day be observed according to Law”).

¹⁴² 10 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 141 (Worthington Chauncey Ford ed., 1908) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS] (“Resolved, That the Board of War be directed to enquire into the conduct of all strangers of suspicious characters, or whose business is not known and approved, who may come to the place where Congress sits, and to take care that the public receive no damage by such persons.”).

¹⁴³ See, e.g., George Washington, *General Orders*, 4 July 1775, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/03-01-02-0027> [<https://perma.cc/B3V2-SJC5>] (“All Officers are required and expected to pay diligent Attention, to keep their Men neat and clean . . . They are also to take care that Necessarys be provided in the Camps and frequently filled up to prevent their being offensive and unhealthy.”).

¹⁴⁴ See *supra* note 26.

¹⁴⁵ See ELIDAD BLACKWELL, A CAVEAT FOR MAGISTRATES. IN A SERMON, PREACHED AT PAULS, BEFORE THE RIGHT HONORABLE THOMAS ATKIN, ESQUIRE, LORD MAJOR OF THE CITY OF LONDON, NOVEMBER THE THIRD, 1644, at 34 (London, Robert Leyburn 1645) (“Never had any Kingdome better Lawes in that respect [caring for the poor], I beseech you take care that they be executed.”); DANIEL DEFOE, THE POOR MAN’S PLEA, IN RELATION TO ALL THE PROCLAMATIONS, DECLARATIONS, ACTS OF PARLIAMENT, &C. WHICH HAVE BEEN, OR SHALL BE MADE, OR PUBLISH’D, FOR A REFORMATION OF MANNERS, AND SUPPRESSING IMMORALITY IN THE NATION 25 (London, A. Baldwin 1698) (“[T]he Vigour of the Laws consists in their Executive Power; Ten thousand Acts of Parliament signify no more than One single Proclamation, unless the Gentlemen, in whose hands the Execution of those Laws is placed, take care to see them duly made use of”); OBADIAH HULME, AN HISTORICAL ESSAY ON THE ENGLISH CONSTITUTION 29 (London, 1771) (“There were three things essentially necessary, to form a Saxon government . . . and these were, a court of council, a court of law, and a chief magistrate. . . . [The] chief magistrate, who was vested with the executive authority to administer the constitution to the people; and whose duty it was to take care that every man, within his jurisdiction, paid a due obedience to the law.”); 2 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW, BEING THE SUBSTANCE OF A COURSE OF LECTURES ON *GROTIUS DE JURE BELLI ET PACIS* 71 (Cambridge, J. Archdeacon 2d ed. 1779) (“The legislative is the joynt understanding of the society, directing what is proper to be done, and is therefore naturally superiour to the executive, which is the joynt strength of the society exerting itself in taking care, that what is so directed shall be done.”). We thank Julian Mortenson for the Defoe, Hulme, and Rutherford references.

every offendour against this Our Proclamation, for their encouragement to bee diligent and faithfull, in, and about the performance of that service.”¹⁴⁶ John Selden’s notes on his translation of an important work by Sir John Fortescue, Chief Justice of the King’s Bench in the fifteenth century, attribute England’s “excellent Constitution” in part to the fact that the king “is circumscribed with Laws which are calculated for the good of the Subject . . . that is, to take care that the Laws be duly put in Execution, and that Right be done.”¹⁴⁷

The phrase “take care” was also used in international treaties, in which one or both sovereigns promised to accomplish something specific.¹⁴⁸ And it had meanings in everyday speech — to look out for or provide for another person or thing¹⁴⁹ — just as it does today.

2. “[T]he Laws.” — We have not reached a confident answer to the question whether, in its original meaning, the faithful execution of “the laws” commanded by the Take Care Clause encompasses only statutes of Congress, or something more — perhaps the Constitution, treaties, common law, or the law of nations, too. The issue does not seem to have been taken up in recorded debates at Philadelphia or during ratification. Some scholars have plausibly suggested that “the laws” in Article II cross-references the Supremacy Clause.¹⁵⁰ But even if true, this does not definitively resolve the question because the cross-reference could include only “the Laws of the United States which shall be made in pursuance” to the Constitution,¹⁵¹ that is, statutes of Congress.¹⁵² Or “the laws” in Article II might encompass the three kinds of federal law that constitute “the supreme Law of the Land”: the Constitution, congressional statutes, and treaties.¹⁵³ We think either answer is plausible, as is the claim first made during the Washington Administration that

¹⁴⁶ BY THE KING, A PROCLAMATION CONCERNING TOBACCO (London, Bonham Norton & John Bill 1624). We have modernized the spelling by replacing “u” with “v” where appropriate.

¹⁴⁷ JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 133 (John Selden trans., London, 1775).

¹⁴⁸ See, e.g., Treaty of Peace Between Louis XIV, King of France and Navarre, and the Lord Protector of the Republic of England, Scotland, and Ireland, art. XXIII, Nov. 3, 1655 (promising that both parties “shall take care that justice be done incorruptedly” to subjects of the other), reprinted in 1 A COLLECTION OF ALL THE TREATIES OF PEACE, ALLIANCE, AND COMMERCE, BETWEEN GREAT-BRITAIN AND OTHER POWERS 81, 84 (London, 1785).

¹⁴⁹ See, e.g., THE HARDSHIPS OF THE ENGLISH LAWS IN RELATION TO WIVES 19 (London, W. Bowyer 1735) (stating that a mother “is more inclined by Nature, to take Care of the Children”).

¹⁵⁰ Goldsmith & Manning, *supra* note 23, at 1856–57; Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1248 (2005).

¹⁵¹ U.S. CONST. art. VI, cl. 2 (emphasis added).

¹⁵² Recent work by Professor John Harrison suggests, based on a close reading of drafts of the Constitution, that “the Laws” most likely refers to statutes alone. John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L.J. 1659, 1671–84 (2018). If “the Laws” in the Take Care Clause refers only to statutes, then the oaths and the Take Care Clause do meaningful work. It would arguably be the oath only that would be the basis for limiting the pardon power, veto power, appointment power, removal power, and the like to faithful exercises thereof.

¹⁵³ See, e.g., RAMSEY, *supra* note 17, at 163–64, 363–64.

“the Laws” also includes the law of nations.¹⁵⁴ We conclude that this question likely is one that will need to be resolved by interpretive methods other than original meaning — structural inferences, functional considerations, liquidation in post-framing practice,¹⁵⁵ later historical gloss, or judicial doctrine. As we discuss below, whether “the Laws” to be faithfully executed include the Constitution in addition to statutes of Congress could have implications for how the history we present here impacts certain debates about presidential power.¹⁵⁶

3. “*Preserve, Protect and Defend.*” — The faithful execution aspect of the oath is conjoined with a promise to “preserve, protect and defend the Constitution” “to the best of [the President’s] ability.”¹⁵⁷ As discussed above, this language was suggested to the Philadelphia Convention by James Madison and George Mason, and adopted without recorded debate. (In fact, most of what was said at Philadelphia was probably not recorded.¹⁵⁸) Scholars have not uncovered any clear precedents or determinate meanings of this language, and our investigations have been largely unavailing. Unlike “faithful execution,” this is not a phrase with clear historical roots.

The *exact* phrase seems to have been used only infrequently prior to the Philadelphia Convention. The contexts in which we located the phrase were almost entirely religious — often describing God’s care for his church or for particular people.¹⁵⁹ Similar but not identical

¹⁵⁴ See PRAKASH, *supra* note 17, at 88 (noting this argument by Secretary of Treasury Hamilton); Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 379–80 (2012) (exploring how the Washington Administration took care to faithfully execute the law of nations).

¹⁵⁵ See THE FEDERALIST NO. 37, *supra* note 100, at 225 (James Madison) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained by a series of particular discussions and adjudications.” (emphasis added)); see also Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (New York, R. Worthington 1884) (explaining that ambiguities in the Constitution “might require a regular course of practice to liquidate and settle the meaning”).

¹⁵⁶ See *infra* pp. 2186–87 referencing the discussion of whether a President can decline to enforce a statute on the ground that he or she believes it is unconstitutional.

¹⁵⁷ U.S. CONST. art II, § 1, cl. 8.

¹⁵⁸ See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 34 (1986).

¹⁵⁹ See, e.g., WILLIAM DODD, REFLECTIONS ON DEATH 58 (Dublin, Thomas Walker 4th ed. 1773) (recounting a prayer to God to “preserve, protect, [and] defend” orphans); THE CONFESSION AND CONVERSION OF THE CHIEFEST AND GREATEST OF SINNERS ¶ 109 (London, T. Hayes 1662) (“But now I know (and for which I heartily and sincerely desire ever to praise thee) that thine anger is turned away, and that thine hand is stretched out still over me, to preserve, protect, defend, maintaine, and to do me good.”); THOMAS WILSON & JOHN BAGWELL, A COMPLETE CHRISTIAN DICTIONARY 350 (Andrew Simson ed., London, E. Cotes 7th ed. 1661) (defining “to keep” as used in *Psalms* 121:4 (King James) — “Behold, he that keepeth Israel shall neither slumber nor sleep” — to mean “To preserve, protect, and defend against enemies and evils, spiritual and bodily”).

phrases — such as protect and defend, preserve and maintain, defend and preserve, support and protect — were used very commonly over many centuries, often in religious contexts.¹⁶⁰

Similar language was used to establish and buttress the Protestant basis of the English monarchy. For example, the coronation oath of Stuart kings included a promise “to grant and to preserve” to the bishops and their churches “all Canonical Privileges, and due Law and Justice,” and to “protect and defend [them], as every good King in his Kingdoms ought to be Protector and Defender of the Bishops and the Churches.”¹⁶¹ This was changed slightly by Parliament in the aftermath of the Glorious Revolution, so that monarchs were required to swear to “[m]aintaine the Laws of God the true Profession of the Gospell and the Protestant Reformed Religion Established by Law[,] [a]nd . . . Preserve unto the Bishops and Clergy of this Realme . . . all such Rights and Priviledges as by Law doe or shall appertaine unto them.”¹⁶² Later statutes reinforcing the Protestant nature of the monarchy used similar language.¹⁶³

Language of protecting, defending, maintaining, supporting, or preserving was also used in the sense of military support or at least physical protection from harm.¹⁶⁴ Letters of protection or safe conduct given by

¹⁶⁰ See, e.g., THOMAS DEACON, A BOOK OF COMMON PRAYER OR CLEMENTINE LITURGY ACCORDING TO THE USE OF THE PRIMITIVE CATHOLIC CHURCH (London, 1734) (reprinting a “Prayer of Benediction”: “. . . but sanctify and keep them, protect, defend, and deliver them from the Adversary and from every enemy; guard their habitations, and preserve their going out and their coming in”); EDWARD LEIGH, A SYSTEME OR BODY OF DIVINITY: CONSISTING OF TEN BOOKS 651–52 (London, A.M. 1654) (defining the word “deliver” in the Lord’s Prayer — “And lead us not into temptation, but deliver us from evil,” *Matthew* 6:13 (King James) — to mean “keep and preserve, to protect and defend from evil, that we fall not into it”); WILLIAM SHERLOCK, SERMONS PREACH’D UPON SEVERAL OCCASIONS: SOME OF WHICH WERE NEVER BEFORE PRINTED 76 (London, 1700) (“God will always preserve and protect the Christian Church, that the true Faith of Christ, and his true and sincere Worshippers shall never wholly fail in the World . . . [W]e learn by that Example, how he will protect, defend, and support the Christian Church to the end of the world . . .”).

¹⁶¹ THE HISTORY OF PUBLICK AND SOLEMN STATE OATHS 15–16 (London, 1716). Charles I echoed the coronation promise in a speech at Lincolnshire during the English Civil War. See BASILAIKA [Basilika]: THE WORKS OF KING CHARLES THE MARTYR 179 (London, 2d ed. 1687) (“I assure you upon the Faith and Honor of a Christian King, I will be always as tender of any thing which may advance the true Protestant Religion, protect and preserve the Laws of the Land, and defend the just Privilege and Freedom of Parliament, as of My Life or My Crown.”).

¹⁶² An Act for Establishing the Coronation Oath 1688, 1 W. & M. sess. 1 c. 6.

¹⁶³ See, e.g., Security of Succession Act (or Abjuration Oath Act) 1702, 13 & 14 Will. 3 c. 6 (requiring an oath to, among other things, “support maintain and defend the Limitation and Succession of the Crown against him the said James,” the Catholic pretender).

¹⁶⁴ See, e.g., *Novanglus*, No. IV, in ADAMS WRITINGS, *supra* note 1, at 175, 178 (“[E]very farthing of expense which has been incurred, on pretence of protecting, defending, and securing America, since the last war, has been worse than thrown away . . . Keeping an army in America has been nothing but a public nuisance.”).

English monarchs used this language,¹⁶⁵ as did treaties of military alliance.¹⁶⁶ Perhaps the most interesting examples of the latter usage are found in treaties of the United States negotiated in the preconstitutional period.¹⁶⁷ Somewhat similarly, it was frequently said that monarchs had the duty to protect and defend (or synonyms) their subjects from violence or oppression.¹⁶⁸

Finally, we see language evocative of the later Article II formulation in some oaths required of governors and other state and national officials in the post-independence era in America. Some were directed to protecting and defending a constitution. For example, the 1776 South Carolina Constitution required state officials to swear to “support, maintain and defend the constitution of South Carolina.”¹⁶⁹ Other oaths, framed during the exigencies of civil war, had military and loyalty connotations. Connecticut, for example, required state officeholders in 1776 to swear to “maintain and defend the Freedom, Independence, and

¹⁶⁵ See, e.g., 1 CALENDAR OF THE CLOSE ROLLS, EDWARD III, A.D. 1327–1330, at 201–02 (London, Eyre & Spottiswoode 1896) (“To the sheriff of Oxford and Berks. Order to cause proclamation to be made prohibiting any one, under pain of forfeiture, from invading by armed force the abbey of Abyndon . . . or any of its manors, or from attempting anything to the breach of the king’s peace, or from inflicting damage or annoyance upon the abbot and monks in their persons and goods The sheriff is ordered to maintain, protect, and defend the abbot and convent and men from such oppressions and wrongs to the best of his power.”).

¹⁶⁶ Treaty of Mutual Defence Between King George I and Prince Charles VI, Emperor of Germany, May 25, 1716, art. II (printed by S. Buckley in London, 1718) (providing that if either’s territory was invaded, the other would come to aid so that territory “be preserved, defended and maintained inviolable, against all Aggressors,” *id.* at 4).

¹⁶⁷ See, e.g., Treaty of Amity and Commerce, U.S.-Fr., art. 6, Feb. 6, 1778, 8 Stat. 12 (“The Most Christian King shall endeavour by all the means in his power to protect and defend all vessels and the effects belonging to the subjects, people or inhabitants of the said United States”); *id.* art. 7 (“In like manner the said United States and their ships of war, sailing under their authority, shall protect and defend, conformable to the tenor of the preceeding article, all the vessels and effects belonging to the subjects of the Most Christian King”). This “protect and defend” treaty language comes from the Model Treaty of 1776, adopted by the Continental Congress. See Plan of Treaties (Sept. 17, 1776), in 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 142, at 768, 769.

¹⁶⁸ For example, Algernon Sidney, the seventeenth-century republican martyr and writer in the Commonwealth tradition who was revered by many American framers, see BAILYN, *supra* note 7, at 34–35, wrote that government must be designed so that magistrates “might not be able to oppress and destroy those [the people] they ought to preserve and protect.” ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 561 (Thomas G. West ed., Liberty Fund 1996) (1698).

¹⁶⁹ S.C. CONST. of 1776, art. XXXIII; see also An Ordinance Prescribing the Oaths of Office to be Taken by the Governor and Privy Council, and Other Officers of the Commonwealth of Virginia ch. 3 (May 1776), reprinted in ORDINANCES PASSED AT A GENERAL CONVENTION OF DELEGATES AND REPRESENTATIVES, FROM THE SEVERAL COUNTIES AND CORPORATIONS 7, 7 (Richmond, Ritchie, Trueheart & Du-val 1816) (requiring the governor to swear to “execute the said office diligently and faithfully, according to law” and “to the utmost of my power, support, maintain and defend, the Commonwealth of Virginia, and the Constitution of the same”).

Privileges of this State against all open Enemies or traiterous Conspiracies whatsoever.”¹⁷⁰ And the Continental Congress required first all army officers, and then also all civil officers of the national government, to take an oath “to the utmost of my power, [to] support, maintain, and defend” the United States.¹⁷¹

We discern no clear and determinate meaning emerging from these various predecessors of the “preserve, protect and defend” oath. As suggested by the plain or dictionary meaning of the words, the phrase seems to suggest both a conceptual fidelity to the Constitution and its principles and a kind of magisterial and even martial promise of physical protection as well. But since that protection is pledged to a document, rather than to a state, community, or particular persons, it is hard to say exactly how this protective sense should be understood. As discussed above, oaths were not generally viewed during framing and ratification as sources of power, but rather as restraints. Thus the power to carry out these meanings would likely have to come from other parts of the Constitution or other law.¹⁷²

* * *

Since the meaning of “take care” is clear, and since the meanings of “the Laws” and of “preserve, protect and defend” are not made determinate by historical antecedents, Philadelphia drafting history, or ratification debates, we proceed in the rest of this paper to focus solely on the language of “faithful execution” in the Take Care Clause and Presidential Oath Clause. We analyze the “faithful execution” component of these clauses together not only because they share diction (which “full faith and credit” does not) but also because we found such commands and oaths to occur in tandem often in our historical investigations.

The brief survey of the state of play during the Convention and ratification debates, and in American culture circa 1787 to 1788, illuminates something about the original meaning of the Faithful Execution Clauses. In the next Part we seek additional evidence of meaning in Anglo-American law prior to 1787.

¹⁷⁰ ACTS AND LAWS, MADE AND PASSED BY THE GENERAL COURT OR ASSEMBLY OF THE STATE OF CONNECTICUT 433 (New London, Conn., Timothy Green 1776) (Early American Imprints Series I [hereinafter EAI] no. 14691).

¹⁷¹ 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 142, at 893–94; 10 *id.* at 114–15.

¹⁷² *But cf.* Goldsmith & Manning, *supra* note 23, at 1854 (“Although legal academics have often stressed that constitutionmakers framed the [Take Care Clause] as a duty rather than a grant of power, a well-known — and commonsensical — canon of textual interpretation instructs that the imposition of a duty necessarily implies a grant of power sufficient to see the duty fulfilled.”). One might argue that the same canon suggests that a duty imposed by oath also implies a grant of power.

II. FAITHFUL EXECUTION FROM MAGNA CARTA TO THE U.S. CONSTITUTION

A vast array of English public and private officers took oaths or were bound by commands of faithful execution of office and law. We start our history in the medieval period, around the time of Magna Carta. Oaths of office and directives to officeholders certainly long predate medieval England, having been found, for example, in both Greek and Roman contexts more than a millennium earlier.¹⁷³ But we are here concerned with English governance because that is most probative of the original meaning of the U.S. Constitution. We show that, over the centuries, a three-part meaning of faithful execution developed. The oath or command of faithful execution to an officeholder came to convey an affirmative duty to act diligently, honestly, skillfully, and impartially in the best interest of the public, a restraint against self-dealing and corruption, and a reminder that officeholders must stay within the authorization of the law and office.

A. *The Medieval Period and the Multiplicity of Oaths*

Oaths to faithfully execute or perform the duties of an office date back in English law to at least the 1200s.¹⁷⁴ These oaths, which were taken by a diverse range of officeholders, typically associated “faithful” with words such as “diligent,” demanded “loyalty” akin to that in feudal oaths of fealty, and at times joined “faithful execution” with proscriptions against self-dealing. This section traces the nascent three-part meaning of “faithful execution.”

¹⁷³ See, e.g., Helen Silving, *The Oath: I*, 68 YALE L.J. 1329 (1959).

¹⁷⁴ Surely there is an earlier history, but we are limited by a lack of surviving texts that have been translated from Latin, Norman, or other languages.

In the 1200s and 1300s, we see mayors,¹⁷⁵ bailiffs,¹⁷⁶ coroners,¹⁷⁷ wardens,¹⁷⁸ keepers of the rolls of Chancery,¹⁷⁹ tax collectors,¹⁸⁰ and many other officers required, as a condition of taking office, to swear an oath to execute it well and faithfully. Magna Carta required such an oath. The great charter imposed on King John in 1215 provided that barons would monitor the king's compliance with the charter's terms, declaring that "the said twenty-five [barons] shall swear that they shall faithfully observe" — *fideliter observabunt* — "all that is aforesaid, and cause it to be observed with all their might."¹⁸¹

It was not only persons holding what we would see as traditional public offices who were required to take such oaths. Holders of quasi-public offices like brokers of woad (a flowering plant valued for dye-

¹⁷⁵ See, e.g., BRITISH BOROUGH CHARTERS, 1216–1307, at 366 (Adolphus Ballard & James Tait eds., 1923) (provision of 1284 royal charter for Conway that the mayor "shall swear to . . . faithfully do those things which pertain to the mayoralty in the same borough"); *id.* at 365 (provision of 1299 royal charter for Northampton that the mayor shall "take his oath to execute faithfully those things which pertain to the mayoralty of the aforesaid town"); CALENDAR OF LETTER-BOOKS PRESERVED AMONG THE ARCHIVES OF THE CORPORATION OF THE CITY OF LONDON AT THE GUILDHALL: LETTER-BOOK C. CIRCA A.D. 1291–1309, at 174 (Reginald R. Sharpe ed., 1901) (reporting a 1303 installation ceremony for mayor of London at which an oath was "there taken of him to keep the City well and faithfully to the use of Sir Edward, the illustrious King of England, and his heirs, &c., and to do right and justice to poor and rich alike, &c").

¹⁷⁶ 1 STATUTES OF THE REALM 210 (Dawsons of Pall Mall 1963) (1810) (requiring bailiffs "to swear, that they will well and faithfully do that which they shall give them in charge on the King's Behalf"); BRITISH BOROUGH CHARTERS, *supra* note 175, at 355 (provision of 1284 royal charter for Cardigan that the bailiff "shall take his oath . . . for the performance and faithful execution of those things which pertain to the bailliwick of the same town").

¹⁷⁷ BRITISH BOROUGH CHARTERS, *supra* note 175, at 360 (provision of 1299 royal charter for Hull that the coroner "shall swear that he will faithfully do and keep those matters which pertain to the duty of a coroner in the borough aforesaid").

¹⁷⁸ *Id.* at 366 (provision of 1299 royal charter for Hull that the warden before assuming office "shall first take his corporeal oath before the aforesaid burgesses on the holy gospels of God that he will . . . faithfully and diligently do all things pertaining to the office of warden in the aforesaid borough").

¹⁷⁹ 4 CALENDAR OF THE CLOSE ROLLS, EDWARD II, A.D. 1323–1327, at 386 (London, Eyre & Spottiswoode 1898) (recording that the king committed rolls of chancery to king's clerk Master Henry de Clyf who "took oath to execute the office well and faithfully"); 3 CALENDAR OF THE CLOSE ROLLS, EDWARD III, A.D. 1333–1337, at 295 (London, Eyre & Spottiswoode 1898) (recording that the king committed rolls, writs, and memoranda of chancery to Sir Michael de Wath, clerk, "to hold in the same manner as Master Henry de Clyf, deceased, had that custody," and Michael "took the oath to exercise that custody well and faithfully").

¹⁸⁰ 3 CALENDAR OF THE CLOSE ROLLS, EDWARD III, A.D. 1333–1337, *supra* note 179, at 676 (recording that the king had in letters patent appointed "John Dyn and John de Hemenhale . . . to seek and receive the fifteenth and tenth granted to him by the laity in the last parliament at Westminster, in co. Essex, and to answer therefor at the exchequer at certain days about to come," and that the king had appointed "the abbot of Waltham Holy Cross . . . to receive their oath to well and faithfully execute everything contained in the said letters").

¹⁸¹ Magna Carta ch. 61, *reprinted in* WILLIAM SHARPE MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 465, 466–67 (2d ed. 1914) (providing Latin original and English translation).

making),¹⁸² “weighers of the Great Balance” (the public scale in a town’s market square) appointed by a pepper and spice merchants guild,¹⁸³ and surgeons¹⁸⁴ also took oaths for the faithful execution or performance of office.

Not all offices had simple oaths requiring only faithful or due execution. Members of the king’s council, for instance, took a detailed oath to “well and truly . . . counsel the king,” “guard and maintain [and] . . . preserve and restore the Rights of the King,” keep secrets discussed in council, act impartially, and eschew bribes.¹⁸⁵ Sheriffs took an oath that detailed specific responsibilities of the office, required impartiality, and barred self-dealing.¹⁸⁶ Justices of royal courts were directed to “do equal Law and Execution of right to all our Subjects, rich and poor, without having regard to any Person” and swore an oath to take no “Fee nor Robe of any Man, but of Ourself [the king], and that they shall take no Gift nor Reward by themselves, nor by other, privily nor apertly, of any

¹⁸² CALENDAR OF LETTER-BOOKS PRESERVED AMONG THE ARCHIVES OF THE CORPORATION OF THE CITY OF LONDON AT THE GUILDHALL: LETTER-BOOK D. CIRCA A.D. 1309–1314, at 258 (Reginald R. Sharpe ed., 1902) (recording that Fulbert Pedefer de Wytsand, elected by merchants to be broker of woad, “was presented and sworn before the Mayor to faithfully execute the office between buyer and seller”).

¹⁸³ CALENDAR OF LETTER-BOOKS PRESERVED AMONG THE ARCHIVES OF THE CORPORATION OF THE CITY OF LONDON AT THE GUILDHALL: LETTER-BOOK H. CIRCA A.D. 1375–1399, at 22 (Reginald R. Sharpe ed., 1907) (recording “John Lokes elected by good men of the mistery of Pepperers to be weigher of the Great Balance, and sworn before John Warde, the Mayor, to faithfully execute the office”).

¹⁸⁴ MEMORIALS OF LONDON AND LONDON LIFE IN THE XIIITH, XIVTH, AND XVTH CENTURIES 337 (Henry Thomas Riley ed. & trans., London, Longmans, Green & Co. 1868) (reporting that in 1369 several named men were sworn as master surgeons of the City of London that “they would well and faithfully serve the people, in undertaking their cures” and “faithfully . . . do all other things touching their calling”).

¹⁸⁵ 1 STATUTES OF THE REALM, *supra* note 176, at 248; *see also* James F. Baldwin, *Antiquities of the King’s Council*, 21 ENGLISH HIST. REV. 1, 2–4 (1906) (reprinting and discussing Latin and French versions of the oath). For Blackstone’s rendition of the eighteenth-century conciliar oath, which is quite similar to the earlier one in the main text, *see* 1 WILLIAM BLACKSTONE, COMMENTARIES *223.

¹⁸⁶ 1 STATUTES OF THE REALM, *supra* note 176, at 247 (requiring sheriffs to swear “well and truly you will serve the King in the Office of Sheriff, and to the Profit of the King will do in all Things which to you belong to do . . . ; and his Rights, and whatever to his Crown belongeth, you will truly guard, and that you will not assent to the Decrease or Concealment of the King’s Rights or Franchises; . . . And the Debts of the King, neither for Gift nor for Favour will you respite . . . ; and that lawfully and rightfully you will treat the People of your Bailiwick, and to every one you will do right, as well to the Poor as the Rich, in that which to you belongeth”).

Man that hath to do before them by any Way.”¹⁸⁷ These oaths effectively specified what it meant to faithfully execute that particular office.¹⁸⁸

But at the same time that officers swore before God to faithfully execute their official duty, use of government office for private gain was widespread; many medieval officials paid the Crown for their offices and then farmed the offices out to deputies, while keeping most of the fees and emoluments of office for themselves.¹⁸⁹ Although it would take centuries of institutional tinkering to figure out how to keep officers faithful in light of the private benefits office conferred, from very early on those who held offices had to invoke God and their honor to take oaths with legal and political consequences.

Oaths — whether simple or more detailed — were sometimes supplemented by sovereign commands directing how officers were to execute their offices. And faithfulness in the duties of the office was a frequent directive. In 1299, for example, Parliament directed sheriffs in Somerset and Dorset, in order to prevent debased coin from entering England, in each port to “choose two good and lawful men . . . who, together with the Bailiffs of the same Port, shall arrest and search, faithfully and without sparing, all those who shall arrive within their

¹⁸⁷ Ordinance for the Justices 1346, 20 Edw. 3 c. 1, *reprinted in* 1 STATUTES OF THE REALM, *supra* note 176, at 303, 303–04. English statutes were customarily dated according to the regnal year — the year of the king or queen’s reign — during which a Parliament sat and produced acts that received the assent of the monarch. We think readers would benefit from a calendar year also, and so have supplied one. But there are some complexities, as this brief note explains. Regnal years did not correspond to calendar years, and Parliaments started and ended on no regular schedule. For example, a statute dated “1 Eliz.” in its standard citation could have been enacted in either 1558 or 1559. See THE OXFORD COMPANION TO ENGLISH LITERATURE app. III at 944 (Paul Harvey ed., 4th ed. 1967). Sometimes a Parliament sat during only one calendar year even though the regnal year spanned parts of two calendar years. In those cases it is easy to consult a standard government source, see 1 CHRONOLOGICAL TABLE AND INDEX OF THE STATUTES TO THE END OF THE SESSION 4 EDW. 7 (20th ed. 1904), to date a statute to a precise calendar year. But when the Parliament spanned calendar years, getting an authoritative date is more difficult. Yet since we are giving calendar years not to precisely date historical events but simply to convey to readers the general time frame in which statutes were enacted, we have been satisfied to cite a two-year range when a Parliament spanned calendar years. We have also been satisfied to accept as authoritative the dates given in the *Chronological Table*, notwithstanding the complexity caused by the fact that in 1751 Great Britain changed the start of its year from March 25 to January 1. See An Act for Regulating the Commencement of the Year 1751, 24 Geo. 2 c. 23.

¹⁸⁸ Indeed, Fortescue wrote in his famous dialogue *De Laudibus Legum Angliae* (Commendation of the Laws of England, circa 1543) that a sheriff must swear “well, faithfully and indifferently to execute and do his duty.” FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE*. THE TRANSLATION INTO ENGLISH 81 (A. Amos trans., Cambridge, J. Smith 1825).

Philip Hamburger, writing about judicial oaths in English history, concludes that differing forms of oaths for different judges likely reflected policy concerns particular to certain offices, and that a failure in some judicial oaths to mention the baseline requirement of every judicial office — faithful adherence to English law — should not be understood to mean that this requirement had been dispensed with. See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 110–11 (2008).

¹⁸⁹ See K.W. SWART, *SALE OF OFFICES IN THE SEVENTEENTH CENTURY* 45–48, 56–57 (1980).

Wards.”¹⁹⁰ The medieval treatise known as *Bracton* (entitled *De Legibus et Consuetudinibus Angliae*) reports that the king’s writ to his justices ordered them to “faithfully and diligently apply yourself to the execution of these matters so that we ought deservedly to commend both your loyalty and your diligence in this matter.”¹⁹¹

In the medieval period, these and like oaths and commands were not just widespread but had tremendous importance in legal, political, religious, and social life. In the feudal system, the obligation of vassal to lord was marked by an oath of fealty that, as *Bracton* relates, involved swearing before God that one’s body, goods, and honor were at the disposal of the lord.¹⁹² According to *Bracton*, the oath often added that the vassal would serve his lord and his heirs “faithfully and without diminution, contradiction, impediment, or wrongful delay.”¹⁹³ Vassalage to a specific lord can be seen as a kind of office, and so perhaps there is little real distinction between an oath of fealty and an oath of faithful execution of office. In addition to fealty to one’s immediate lord, English law also imposed oaths of fealty to the king on all adult male subjects,¹⁹⁴ as well as specific commands of fealty to the Crown in many legal documents such as commissions and charters.¹⁹⁵

At the same time, leading men of the realm desired that monarchs respect custom and law, rather than rule arbitrarily. There thus emerged the practice of the coronation oath to which we alluded in Part I, a series of formal promises made at the time of monarchical investiture.¹⁹⁶ In 1216, Henry III’s coronation oath, which apparently was quite similar to his predecessors’, involved three promises (*tria precepta*): to “preserve peace and protect the church, to maintain good laws and abolish bad, to dispense justice to all.”¹⁹⁷ But soon coronation oaths changed

¹⁹⁰ A Statute Concerning False Money 1299, 27 Edw. I, reprinted in 1 STATUTES OF THE REALM, *supra* note 176, at 132.

¹⁹¹ 2 HENRICI DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 309 (George Woodbine ed. & Samuel Thorne trans., Belknap Press 1968) (c. 1230–1250).

¹⁹² *Id.* at 232. Coke reports the oath of homage or fealty from a vassal to his lord as follows: “I become your man from this day forward of life and limb, and of earthly worship, and unto you shall be true and faithful, and bear you faith for the Tenements that I claim to hold of you (saving the faith I owe unto our Sovereign Lord the King[.]).” EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND bk. II, ch. I, § 85, at 64–65 (London, William Rawlins & Samuel Roycroft 10th ed. 1703).

¹⁹³ 2 BRACON, *supra* note 191, at 232.

¹⁹⁴ Caroline Robbins, *Selden’s Pills: State Oaths in England, 1558–1714*, 35 HUNTINGTON LIBR. Q. 303, 308 (1972) (oath of fealty to the monarch existed from the time of William the Conqueror until the Revolution).

¹⁹⁵ See, e.g., BRITISH BOROUGH CHARTERS, *supra* note 175, at 367.

¹⁹⁶ See *supra* pp. 2127–28.

¹⁹⁷ H.G. Richardson, *The English Coronation Oath*, in 23 TRANSACTIONS OF THE ROYAL HIST. SOC’Y 129, 129 (1941) (summarizing the oath); see also Coronation of Richard I (1189), in ENGLISH CORONATION RECORDS 46, 51–52 (Leopold G. Wickham Legg ed., 1901).

somewhat.¹⁹⁸ In addition to promising to preserve the church and clergy, do rightful justice with mercy and discretion, and strengthen and defend the laws concerning worship, monarchs were pointedly required to affirm that they would grant and keep both the people's and clergy's laws and customs.¹⁹⁹ While monarchs and their intellectual defenders claimed that these duties made a king accountable only to his own conscience and God, an important strand of English thought contended that the king was subservient to the law and, as confirmed in the coronation oath, owed a contractual duty to the people to govern well and for their benefit.²⁰⁰ On this view of the coronation oath, it undergirded and confirmed a constitutionally limited monarchy.²⁰¹

*B. The Early Modern Era, the Tudors,
and More Specification of Faithful Execution*

The early modern period saw many oaths for the faithful execution of office, both those contained in statutes and custom. In reviewing a large number of oaths, we paid careful attention to which words and concepts were frequently associated with faithful execution in statutes, commissions, and similar documents, and cross-referenced those findings with dictionaries to help define faithful execution. Clues to the evolving meaning of faithful execution are also found in background principles of law that defined the duties of officeholders, and in the words and actions of political authorities who shaped norms of office-holding. Three strands of faithful execution emerged: First, faithful was linked with words such as diligent, honest, due, careful, impartial, and skillful, suggesting an affirmative duty. Second, oaths or commands of faithful execution were increasingly understood to proscribe self-dealing. Third, these oaths or commands similarly proscribed ultra vires action.

Whether in oaths or in other statutory directives to officeholders, Parliament continued to specify what faithful execution meant for various offices. For example, commissioners charged with collecting taxes, building sewers, and readying castles and fortifications were obliged to

¹⁹⁸ See PERCY ERNEST SCHRAMM, A HISTORY OF THE ENGLISH CORONATION 203–13 (Leopold G. Wickham Legg trans., 1937); Richardson, *supra* note 197, at 146–47.

¹⁹⁹ See, e.g., Little Device for the Coronation of Henry VII, in ENGLISH CORONATION RECORDS, *supra* note 197, at 219, 230; see also ENGLISH CORONATION RECORDS, *supra* note 197, at xv, xxxi.

²⁰⁰ See, e.g., JONES, *supra* note 94, at 18–20. Fortescue, the fifteenth-century jurist, was one of the chief sources of this view. See JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 48 (Shelley Lockwood ed., Cambridge Univ. Press 1997) (“[Y]ou have already heard how among the civil laws there is a famous sentence, maxim or rule, which runs like this, ‘What pleased the prince has the force of law.’ The laws of England do not sanction any such maxim, since the king of that land rules his people not only royally [by prerogative] but also politically, and so he is bound by oath at his coronation to the observance of his law.”).

²⁰¹ See *supra* note 94 and *infra* notes 263–266 and accompanying text.

act diligently, truly, effectually, and impartially.²⁰² Parliament started adding requirements to oaths of office or specifications of duties that the holder stay within his authority and abide by the intent of the legislation empowering him.²⁰³ Other statutes charged officeholders, usually by oath, to take no profits from the office beyond what was allowed by law or custom.²⁰⁴ The important Sale of Offices Act of 1551/52 banned the sale of any public office relating to the administration of justice, taxation and customs, the surveying or auditing of the king's properties, or the keeping of castles and fortifications.²⁰⁵ An earlier statute had barred any senior crown officeholder — “the Chancellor, Treasurer, Keeper of the Privy Seal, Steward of the King's House,” and the like — from appointing a lower officer “for any Gift or Brocage, Favour or Affection.”²⁰⁶ And statutes or royal directives also sometimes specified that an officeholder's failure to well and faithfully execute the office — sometimes phrased as a failure to demean oneself well in office — were cause

²⁰² See, e.g., An Acte for the Reedyfieng of Castelles and Fortes, and for Thenclosing of Grown des from the Borders Towardes and Against Scotlande 1555, 2 & 3 Phil. & M. c. 1, § 2 (providing that the Crown shall appoint commissioners in northern areas of England to inquire into the state of castles, fortresses, and the like, to plan their upkeep and to tax and assess landowners for that purpose; requiring commissioners take corporal oath that to your “cuning witt & power shall truly & indifferently execute thauthorite to you gyven by this Comission, w[ith]out any favour affeccion corruption drede or malice to bee borne to any maner pson or psones”); A Genall Act Concnynge Comissions of Sewers to Be Directed in All Parts Within This Realme 1531/32, 23 Hen. 8 c. 5, § 2 (instructing commissioner for sewers to take oath “[t]hat you to your connyng witte and power shall truly and indifferently execute the authoritie to you yoven by this Comission of Sewers, without any favour affeccion corrupcion drede or malice to be borne to any manner psonne or psonnes”); The Subsidye 1514/15, 6 Hen. 8 c. 26, § 5 (stating that commissioners charged with raising the king's revenue “shall truly effectually and diligently wythout omyssyon favour affeccion fere drede or malice execute” the office).

²⁰³ See, e.g., An Acte for a Subsidie to the Kyng and Que[en] Ma[jesty] 1555, 2 & 3 Phil. & M. c. 23, § 6 (directing commissioners for examining value of people's holdings and assessing a tax to “truly effectually and diligently for their pte execute theeffecte of this [present] Acte accordyng to the teno[r] thereof in ev[er]ly behalfe, and none otherwise, by any meanes, w[ith]out omission favor drede malice or any other thyng to be attempted and don by them or any of them to the contrary thereof”); An Acte for the Graunte of One Entier Subsidie and Twoe Fifteenes and Tenthes Graunted by the Temporalitie 1586/87, 29 Eliz. c. 8, § 9 (same).

²⁰⁴ See, e.g., An Act for the Swearinge of Under Sherifes and Other Under Officers and Mynisters 1584/85, 27 Eliz. c. 12, §§ 1, 3 (providing that undersheriffs, bailiffs, and their deputies take a corporal oath that they “shall not use or exercise the office . . . corruptly during the tyme that [they] shall remaine therein, neither shall or will accept receive or take by any Colour Meanes or Devise whatsoever, or consent to the taking of, any maner of Fee or Rewarde of any person or persons, for the impanelling or returning of any Inquest Jurie or Tales in any Court of Recorde for the Queene, or betwixt partie and partie, above Two shillings or the vallue thereof, or such Fees as are alowed and appoynted for the same by the Lawes and Statutes of this Realme,” *id.* § 1).

²⁰⁵ 5 & 6 Edw. 6 c. 16.

²⁰⁶ 1388, 12 Rich. 2 c. 2. Brocage meant “[t]he corrupt farming or jobbing of offices; the price or bribe paid unlawfully for any office or place of trust.” *Brocage*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/23630?redirectedFrom=brocage#eid> [<http://perma.cc/W89A-XS5G>].

for removal.²⁰⁷ Later, it would be said that this condition was implied by law in every public office.²⁰⁸

In practice, public office was frequently abused for private gain, despite the safeguards just described and the common requirement of faithful execution. Many officers had life tenure in their offices, which were treated as property interests.²⁰⁹ In addition to or instead of salaries, offices often gave the holder streams of income from fees for service and gratuities or tips, as well as the opportunity to attempt to control who would succeed in the office.²¹⁰ All of this produced many opportunities for private profit and corruption, whether legal or illegal.²¹¹ Notwithstanding these widespread practices, it remains significant that in a highly religious era, so many officeholders were required to pledge before God to faithfully execute their duties.

Finally, religious test oaths for officeholders were introduced during the Tudor period, spurred by Henry VIII's break from the Church of Rome.²¹² Mandatory religious test oaths — enforcing Anglican orthodoxy, denying the power and jurisdiction of the Church of Rome, and pledging fealty to the English monarch as the head of both church and state — became an enormously significant part of English public life for centuries to come.²¹³

²⁰⁷ See, e.g., Swearing of Under Sherifes §§ 4–5 (providing that any undersheriff, bailiff, or deputy who violates the statute and its oaths forfeits the office, and this can be enforced by justices of the peace and justices of assize); The Charter of Queen Elizabeth for the East India Company (Dec. 31, 1600), reprinted in COURTENAY ILBERT, *THE GOVERNMENT OF INDIA* 464, 472 (Oxford, Clarendon Press 1898) (“[The] Governor, not demeaning himself well in his said Office, we will to be removeable at the Pleasure of the said Company . . .”). An earlier statute directed justices of the assizes to hear and determine complaints at the suit of the king or a private party against sheriffs, escheators, bailiffs, and other officers who abused their offices. See Ordinance for the Justices 1346, 20 Edw. 3 c. 6, reprinted in 1 *STATUTES OF THE REALM*, supra note 176, at 303, 305.

²⁰⁸ See 3 MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW* 741 (Dublin, Luke White 6th ed. 1793) (“It is laid down in general, that if an Officer acts contrary to the Nature and Duty of his Office, or if he refuses to act at all, that in these Cases the Office is forfeited . . . for that in the Grant of every Office it is implied, that the Grantee execute it faithfully and diligently.”).

²⁰⁹ See G. E. AYLMER, *THE KING'S SERVANTS: THE CIVIL SERVICE OF CHARLES I*, 1625/42, at 106 (1961) [hereinafter AYLMER, *KING'S SERVANTS*]; 2 BLACKSTONE, supra note 185, at *36.

²¹⁰ See AYLMER, *KING'S SERVANTS*, supra note 209, at 160, 176, 179.

²¹¹ See, e.g., G. E. AYLMER, *THE STATE'S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC, 1649–1660*, at 78 (1973) [hereinafter AYLMER, *STATE'S SERVANTS*]. As a result of this corruption, Professor G. E. Aylmer questions “how seriously these oaths [as a condition of taking office] were regarded” by officeholders. AYLMER, *KING'S SERVANTS*, supra note 209, at 143.

²¹² Enid Campbell, *Oaths and Affirmations of Public Office Under English Law: An Historical Retrospect*, J. LEGAL HIST., Dec. 2000, at 1, 6–7.

²¹³ See An Acte for Thassurance of the Quenes Ma[jesty's] Royall Power over All Estates and Subjectes Within her Highnes Dominions 1562/63, 5 Eliz. c. 1; An Acte Restoring to the Crowne Thaucyent Jurisdiction over the State Ecclesiasticall and [Spiritual], and Abolyshing all Forreine Power Repugnaunt to the Same (Act of Supremacy) 1558/59, 1 Eliz. c. 1; An Acte Extynguysshing the [Authority] of the [Bishop] of Rome 1536, 28 Hen. 8 c. 10; An Acte Ratyfieng the [Oath] that Everie of the Kynges Subjectes Hath Taken and Shall Hereaft[er] Be Bounde to Take for Due Ob[ser]vacyon of the Acte Made for the Suretie of the Successyon of the Kynges Highnes in the

*C. Faithful Execution and Oaths of Office in
the Tumultuous Seventeenth Century*

I. Within the Realm. — In the seventeenth century, many English offices continued to have requirements, by oath or otherwise, of faithful execution of duties. Examples of offices of this kind are varied, from officers of trading, merchant, or exploration corporations,²¹⁴ to wardens, porters, and keepers of the gates of London,²¹⁵ excise officers,²¹⁶ auditors

Crowne of the Realme 1534, 26 Hen. 8 c. 2; An Acte Conc[er]nyng the Kynges Highnes to be Supreme Heed of the Churche of Englande & to Have [Authority] to Refourme & Redresse All Errours Heresydes & Abuses yn the Same 1534, 26 Hen. 8 c. 1; An Acte for the Establishement of the Kynges Succession 1533/34, 25 Hen. 8 c. 22. The secondary literature on these issues is vast. For a recent work emphasizing the important role of oaths, see GRAY, *supra* note 64.

²¹⁴ Charter of 1605 for the Spanish Company, *reprinted in* THE SPANISH COMPANY 95, 106 (Pauline Croft ed., 1973) (providing that “assistants” of the corporation “before they be admitted to the execution of their offices shall take a corporal oath . . . that they and every of them shall well and faithfully perform their offices of assistants in all things concerning the same”); The Charter of Queen Elizabeth for the East India Company, *supra* note 207, at 469–70 (providing that the governor must take an oath to “well and truly execute the Office of Governor of the said Company,” *id.* at 470, and the deputy to the governor to “well, faithfully and truly to execute his said Office,” *id.* at 469).

²¹⁵ 2 JOHN STOW, A SURVEY OF LONDON: REPRINTED FROM THE TEXT OF 1603, at 146 (Charles Lethbridge Kingsford ed., 1908) (recording that these officials took an oath before assuming office “[t]hat they should well and faithfully keepe” the gates and ports of entry).

²¹⁶ An Act Takeing Away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance, and for Setling a Revenue upon his Majesty in Lieu Thereof 1660, 12 Car. 2 c. 24, § 34 (“That noe person or persons shall be capeable of intermedling with any Office or Employment relateing to the Excise untill he or they shall” take the oath: “You shall sweare to execute the Office of [____] truly and faithfully without Favour or affection, and shall from [time] to time true Account make and deliver to such person or persons as his Majestie shall appoint to receive the same, and shall take noe Fee or Reward for the Execution of the said Office from any other person than from his Majestye”); A Grant of Certaine Impositions upon Beere Ale and Other Liquors for the Encrease of His Majestyes Revenue Dureing His Life 1660, 12 Car. 2 c. 23, § 22 (same oath); An Ordinance and Declaration Touching the Sallery and Allowance to Be Made to the Commissioners and Auditors for the Excise, (1643) 1 ACTS & ORDS. INTERREGNUM 287, 288 (C.H. Firth & R.S. Rait eds., 1911) (“You shall sweare to be faithfull and true in your place of Commissioner for the Excise . . . according to the Ordinance of both Houses of Parliament in that behalfe made. You shall according to your knowledge execute the same diligently and faithfully, having no private respect to your selfe in prejudice of the Common-wealth”).

of the kingdom's accounts,²¹⁷ surveyors of confiscated church lands,²¹⁸ customs officers,²¹⁹ tax assessors,²²⁰ brokers between merchants,²²¹ and officers of merchant or craft guilds.²²² In a development that would soon impact the Americas, the royal charters of some of the new overseas trading corporations also required oaths of faithful execution for their officers and directors.²²³ One can get some sense of what the relevant words meant by observing that in statutes and other legal commands, faithful execution was often linked during this time period with true, diligent, well, due, skillful, careful, and impartial discharge of the duties of office. One also sees misgovernment by ministers and other royal

²¹⁷ See An Ordinance for Taking and Receiving of the Accompts of the Whole Kingdom, (1643/44) 1 ACTS & ORDS. INTERREGNUM 387, 388 ("I, A.B., do swear, that according to my best skill and knowledge, I shall faithfully, diligently, and truly demean my self, in taking the Accompts of all such persons as shall come before me, in execution of an [ordinance], entituled [this act named], according to the tenour of the said Ordinance: And that I shall not for fear, favour, reward or affection, give any allowance to conceal, spare, or discharge any. So help me God."); An Act for Appointing and Enabling Commissioners to Examine Take and State the Publicke Accounts of the Kingdome 1690, 2 W. & M. sess. 2 c. 11, § 4 (providing that, to ensure that moneys raised for war with France were expended for correct purposes, named individuals appointed "Commissioners for takeing of the Accounts" shall "Sweare That according to the best of my Skill and Knowledge I shall Faithfully Impartially and Truly demeane myselfe in examining and takeing the Accounts of all such Summe . . . of Money and other Things brought or to be brought before me in Execution of one Act [this act named] according to the Tenour and Purport of the said Act").

²¹⁸ An Ordinance for the Abolishing of Archbishops and Bishops Within the Kingdom of England, and Dominion of Wales, and for Setling of Their Lands and Possessions upon Trustees, for the Use of the Commonwealth, (1646) 1 ACTS & ORDS. INTERREGNUM 879, 881 ("I will faithfully and truly according to my best skill and knowledge, execute the place of a Surveyor, according to the purport of an Ordinance [this named act] . . . this I shall justly and faithfully execute, without any gift or reward, directly or indirectly, from any person or persons whatsoever.").

²¹⁹ An Act for Preventing Frauds and Regulating Abuses in His Majesties Customes 1662, 14 Car. 2 c. 11, § 31 (providing that no person "shall hereafter be employed or put in trust in the busines of the Customes untill he shall first have taken his Oath . . . for the true and faithfull execution and discharge to the best of their knowledge and power of their several Trusts").

²²⁰ An Act for Granting a Subsidy to his Majestie for Supply of His Extraordinary Occasions 1670/71, 22 & 23 Car. 2 c. 3, § 15 (providing that assessors under this tax law must take an oath "well and truly to execute the Duty of an Assessor . . . [and] you shall spare noe person for Favour or Affection, nor any person greive for Hatred or ill Will").

²²¹ An Act to Restraine the Number and Ill Practice of Brokers and Stock-Jobbers 1696/97, 8 & 9 Will. 3 c. 32, § 2 (providing that brokers in London and Westminster must be licensed, must follow specified practices, must take a "Corporal Oath . . . That I will truly and faithfully execute and performe the Office and Employment of a Broker betweene Party and Party . . . without Fraud or Collusion to the best of my Skill and Knowledge and according to the Tenour and Purport of the Act [this act named]," and must "enter into one Obligation [bond] to the Lord Mayor Citizens and Comonalty of the City of London," the obligation of which is to "truly use execute and performe the Office and Employment of a Broker between Party and Party without Fraud Covin or any corrupt or crafty Devices according to the Purport true Intent and Meaning" of this statute).

²²² An Act for Regulateing the Makeing of Kidderminster Stuffles 1670/71, 22 & 23 Car. 2 c. 8, § 1 (providing that persons who are master weavers in the parish of Kidderminster will be appointed to "the Office of President or Warden or Assistant . . . of the Trade of Clothiers and Stuffle-Weavers," so that cloth is not debased, and must take oath to "faithfully and honestly performe and discharge the Office").

²²³ See The Charter of Queen Elizabeth for the East India Company, *supra* note 207, at 469–71.

officials condemned, during impeachment proceedings or in other fora, as “unfaithfulness and carelessness,”²²⁴ “contrary to his oath, and the faith and trust reposed in him,”²²⁵ and “contrary to the laws of this kingdom, and contrary to his oath” “for his faithful discharge of his said office.”²²⁶ Reviews of parliamentary impeachments show a “public trust theory” at work, in which “acting contrary to oath, to the duty of the official position, to the great trust reposed in the accused by the King, and to the laws of the Realm” were key elements.²²⁷

As always, there was a gap between the law’s ideals and the actual practices of men. Corruption under James I and Charles I was a flash-point for conflicts with Parliament. Public offices were sold, for the benefit of the king or those close to him, sometimes disguised as loans to the Crown.²²⁸ By investigation, remonstrance, and impeachment Parliament attempted to reduce this practice.²²⁹ At Parliament’s instance and by royal commission, the 1620s and 1630s also saw investigations and draft bills against the taking of excessive fees by officers.²³⁰ Royal commissions from 1629 to 1634 “found much amiss” in administration of the Navy and the Ordnance, and in 1635 the Privy Council ordered all officers there to take an oath “for the due and faithful execution of their places and charge respectively” as a remedy.²³¹

During Parliament’s long struggle with Charles I, which ended with his trial and execution in 1649,²³² Parliament frequently remonstrated that malicious ministers surrounding the king had failed to duly execute laws of the land²³³ and had betrayed their “trusts” by acting against

²²⁴ Resolutions on Religion Drawn by a Sub-committee of the House of Commons (Feb. 24, 1628/29), in *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION*, 1625–1660, at 77, 77 (Samuel Rawson Gardiner ed., Oxford, Clarendon Press 1899) [hereinafter Gardiner].

²²⁵ Proceedings Against Sir Richard Gurney, [Knight and Baronet] Lord Mayor of London, on an Impeachment of High Crimes and Misdemeanors: 18 Charles I. A.D. 1642, in 4 *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783*, at 160, 161 (T.B. Howell ed., London, T.C. Hansard 1816) [hereinafter Howell].

²²⁶ Articles of Impeachment Against Sir Thomas Gardiner, Recorder of the City of London, for High Crimes and Misdemeanors: 18 Charles I. A.D. 1642, in Howell, *supra* note 225, at 167, 167.

²²⁷ E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 *GEO. L.J.* 1025, 1040 (1975).

²²⁸ See *AYLMER, KING’S SERVANTS*, *supra* note 209, at 228–29.

²²⁹ See *id.* at 188–90, 229–30.

²³⁰ See *id.* at 188–95, 199.

²³¹ *Id.* Not that this “remedy” had worked when the officers were required to take oaths previously — but this doubling down on oaths of faithful execution shows that at their core, such oaths were part of an anticorruption strategy.

²³² Philip Baker, *The Regicide*, in *THE OXFORD HANDBOOK OF THE ENGLISH REVOLUTION* 154, 154 (Michael J. Braddick ed., 2015) [hereinafter Braddick].

²³³ See, e.g., The Nineteen Propositions Sent by the Two Houses of Parliament to the King at York (1642), in Gardiner, *supra* note 224, at 249, 252 (“That the laws in force against Jesuits, priests,

Parliament and the common good.²³⁴ And finally, Charles I was executed because, among other things, “trusted with a limited power to govern by and according to the laws of the land, and not otherwise; and by his trust, oath and office, being obliged to use the power committed to him, for the good and benefit of the people,” he instead acted tyrannically, violated his oath, failed to follow the law, made war on his people, and violated their rights and liberties.²³⁵ A few weeks after Charles’s execution, the poet and republican theorist John Milton published *The Tenure of Kings and Magistrates*, which argued that the coronation oath was a “bond or Covenant” in which the people promised allegiance to the king and the king promised “to doe impartial justice by Law,” laws “which they the people had themselves made, or assented to.”²³⁶ But the people were released from their allegiance “if the King . . . prov’d unfaithfull to his trust,”²³⁷ and then might “depose and put to death th[e]ir tyrannous King[.]”²³⁸

Consistent with the findings discussed in section I.C above, during this time period, several distinctive strands of faithful execution were reinforced, namely rules against self-dealing and unjustified profit from office, rules constraining the kinds of motives appropriate to executing an office, and the requirement of staying within authority and abiding by the intent of the legislation or other positive law empowering the officeholder.

During the time in which England was ruled, effectively and then de jure, without a king — periods of the Civil War, Commonwealth, and Protectorate, from 1642 until 1660 — there was frequent linkage of a rule against self-dealing with faithful execution, particularly for offices dealing with the receipt, account, or payment of moneys.²³⁹ Parliament, for example, directed oaths of faithful execution with the addendum that the oath-taking officeholder would have “no private respect to your selfe

and Popish recusants, be strictly put in execution, without any toleration or dispensation to the contrary . . .”).

²³⁴ See, e.g., Proceedings Against Sir Edward Herbert, [Knight] the King’s Attorney General, upon an Impeachment for High Crimes and Misdemeanors: 17 Charles I. A.D. 1642, in Howell, *supra* note 225, at 119, 120, 123.

²³⁵ The Trial of Charles Stuart, King of England; Before the High Court of Justice, for High Treason: 24 Charles I. A.D. 1649, in Howell, *supra* note 225, at 990, 1070–71. For more on the charges and theories used to support the regicide, see SARAH BARBER, REGICIDE AND REPUBLICANISM: POLITICS AND ETHICS IN THE ENGLISH REVOLUTION, 1646–1659 (1998); and Baker, *supra* note 232, at 154–69.

²³⁶ JOHN MILTON, THE TENURE OF KINGS AND MAGISTRATES 11 (William Talbot Allison ed., Henry Holt & Co. 1911) (1649).

²³⁷ *Id.*

²³⁸ *Id.* at 26. On Milton’s popularity with American patriots, see BAILYN, *supra* note 7, at 34.

²³⁹ This period also saw the widespread use of loyalty oaths to attempt to bind and affect the behavior of officials and members of the public. See John Walter, *Crowds and Popular Politics in the English Revolution*, in Braddick, *supra* note 232, at 330, 341–42.

in prejudice of the Common-wealth”;²⁴⁰ would not be diverted from duty by “fear, favour, reward or affection”;²⁴¹ or would not take “any gift or reward, directly or indirectly, from any person or persons whatsoever” but what was allowed by law or superior officer.²⁴² Perhaps reflecting the republican views of leading members,²⁴³ the Commonwealth and Protectorate parliaments also began to describe public offices as “trusts” much more frequently than previous parliaments,²⁴⁴ suggesting

²⁴⁰ An Ordinance and Declaration Touching the Sallery and Allowance to Be Made to the Commissioners and Auditors for the Excise, (1643) 1 ACTS & ORDS. INTERREGNUM 287, 288; *see also supra* note 216; An Act for the Speedy Raising and Levying of Moneys by Way of New Impose or Excise, (1649) 2 ACTS & ORDS. INTERREGNUM 213, 214 (providing that commissioners of the excise and impost “shall swear to be true and faithful to the Commonwealth of England” and “shall according to [their] knowledge, power and skill execute the same diligently and faithfully, having no private respect to [themselves], in prejudice of the Commonwealth”).

²⁴¹ An Ordinance for Taking and Receiving of the Accompts of the Whole Kingdom, (1643/44) 1 ACTS & ORDS. INTERREGNUM 387, 388; *see supra* note 217; An Act for Transferring the Powers of the Committee for Indempnity, (1652) 2 ACTS & ORDS. INTERREGNUM 588, 590 (providing that commissioners who would determine the indemnity due to persons who acted for Parliament during the civil wars must take an oath: “That I will, according to my best skill and knowledge, faithfully discharge the Trust committed unto me, in relation to an Act [this act named]: And that I will not for favor or affection, rewards or gifts, or hopes of reward or gift break the same”).

²⁴² An Ordinance for the Abolishing of Archbishops and Bishops Within the Kingdom of England, and Dominion of Wales, and for Settling of Their Lands and Possessions upon Trustees, for the Use of the Commonwealth (1646), 1 ACTS & ORDS. INTERREGNUM 879, 881; *see also supra* note 218; An Act for the Deafforestation, Sale and Improvement of the Forests and of the Honors, Manors, Lands, Tenements and Hereditaments Within the Usual Limits and Perambulations of the Same. Heretofore Belonging to the Late King, Queen and Prince, (1653) 2 ACTS & ORDS. INTERREGNUM 783, 789–90 (providing that surveyors of lands confiscated from the family of Charles I must take an oath: “That I will, by the help of God, faithfully and truly, according to my best skill and knowledge, execute the place of Surveyor according to the purport of the Act [this act named] . . . [a]nd this I shall justly and faithfully execute, without any Gift or Reward, or hope of Reward, directly or indirectly, from any person or persons whatsoever (Except such Allowances as the said Trustees or four or more of them shall think fit to make unto me, for my pains and charges in the executing of the said Place and Office.)”).

²⁴³ *See* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 361–422 (1975). *See generally* JONATHAN SCOTT, *COMMONWEALTH PRINCIPLES: REPUBLICAN WRITING OF THE ENGLISH REVOLUTION* (2004); *REPUBLICANISM, LIBERTY, AND COMMERCIAL SOCIETY*, 1649–1776 (David Wootton ed., 1994).

²⁴⁴ The Sale of Offices Act of 1551/52, 5 & 6 Edw. 6 c. 16, had described as “Services of Truste” offices involved with receipt, account, or disbursement of public moneys, *see id.* § 1, but that was an infrequent locution in parliamentary statutes of the medieval and early modern period. During the interregnum this descriptor became much more common, and its use seemed to broaden. *See, e.g.,* An Act for Subscribing the Engagement, (1649/50) 2 ACTS & ORDS. INTERREGNUM 325, 325 (imposing a loyalty oath of “all and every person” holding “any Place or Office of Trust or Profit, or any Place or Employment of publique Trust whatsoever”); An Ordinance to Disable Any Person Within the City of London and Liberties Thereof, to Be of the Common-Councell, or in Any Office of Trust Within the Said City, that Shall Not Take the Late Solemne League and Covenant, (1643) 1 ACTS & ORDS. INTERREGNUM 359, 359 (describing London government offices as “publique Offices and places of Trust”).

a special obligation to act for the good of the public.²⁴⁵ During the interregnum, Parliament also declared, in its statute announcing that England was a Commonwealth, that officers and ministers would be selected and appointed “for the good of the people,”²⁴⁶ that is, not for the good of the government or the private benefit of the officeholder. The famous Self-Denying Ordinance of 1645 required members of Parliament to resign any other civil or military offices they held, and declared that officeholders “shall have no profit out of any such office, other than a competent salary for the execution of the same, in such manner as both Houses of Parliament shall order and ordain.”²⁴⁷

Other reforms occurred during this time aimed at making the holders of public offices more accountable and trustworthy, and less likely to abuse office for private gain. Many offices were converted from life to either pleasure or good behavior tenure.²⁴⁸ The use of salaries to compensate officers increased, as did the amounts paid in salaries, because this was thought to make officers more honest and public-spirited.²⁴⁹ For the same reason, fee-taking by public officers was attacked; although reformers did not succeed in total abolition, many fees were reduced and made more transparent.²⁵⁰

Leading thinkers in the “Commonwealth” tradition, whose influence on the American revolutionary generation was immense, wrote and spoke repeatedly in favor of the public good being the measure of government policy and the aim of all government offices, and against various kinds of corruption and abuse of public office, including the use of office for private profit.²⁵¹

²⁴⁵ The idea of kingship as an office existing for the common good of the people was already an old one by this time. See, e.g., FORTESCUE, *supra* note 200, at 53 (“St. Thomas [Aquinas], in the book which he wrote for the king of Cyprus, *On Princely Government*, says that ‘the king is given for the sake of the kingdom and not the kingdom for the sake of the king.’”); see also CONAL CONDREN, ARGUMENT AND AUTHORITY IN EARLY MODERN ENGLAND: THE PRESUPPOSITION OF OATHS AND OFFICES 19–20, 101 (2006) (noting that in English thought officeholders were said to be shepherds who needed to protect and tend to their flocks).

²⁴⁶ An Act Declaring England to Be a Commonwealth (May 19, 1649), *reprinted in* Gardiner, *supra* note 224, at 388, 388.

²⁴⁷ The Self-Denying Ordinance (Apr. 3, 1645), *reprinted in* Gardiner, *supra* note 224, at 288.

²⁴⁸ See AYLMER, STATE’S SERVANTS, *supra* note 211, at 82.

²⁴⁹ See *id.* at 107, 110.

²⁵⁰ See *id.* at 113–15, 120. The process of moving away from fee-based remuneration of public officers to salaries took centuries to complete. See generally NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013).

²⁵¹ Caroline Robbins wrote the classic study. See CAROLINE ROBBINS, THE EIGHTEENTH CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES (1959). For statements by a leading Commonwealth theorist, see SIDNEY, *supra* note 168, at 91: “[C]ommon sense teaches, and all good men acknowledge, that governments are not set up for the advantage, profit, pleasure or glory of one or

Although acts and ordinances of the interregnum were treated as void upon the restoration of the monarchy in 1660,²⁵² Parliament and other lawmakers continued the Commonwealth practice of frequently linking faithful execution to anti-self-dealing directives, particularly for offices concerning the public fisc.²⁵³ After the restoration, important statutes about public employment continued the language of “trust” to describe offices,²⁵⁴ and Commonwealth-era ideas about increasing salarization, reducing life tenures in office, eliminating sales of office, and making fees transparent and fixed continued to influence public administration.²⁵⁵

Parliament and other lawmakers requiring faithful execution of office also continued to link this concept to the officer staying within legal authority and abiding by the intent of the legislation or other positive law empowering the officeholder. Statutes frequently recited that officeholders bound to faithfully execute must do so according to the “[t]enor” or “[p]urport” of the act,²⁵⁶ or “according to the true intent and

a few men, but for the good of the society. . . . And we may from hence collect, that in all controversies concerning the power of magistrates, we are not to examine what conduces to their profit or glory, but what is good for the publick.” *Id.*

²⁵² 3 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642–1660, at iii, xxxii (C. H. Firth & R. S. Rait eds., 1911).

²⁵³ See sources cited *supra* note 217; see also, e.g., An Act for Granting to Their Majesties Certain Rates and Duties 1693, 5 W. & M. c. 7, § 13 (providing that commissioners collecting duties on imported goods must take an oath “to execute [their] Office truly and faithfully without favour or affection . . . and shall take noe Fee or Reward for the [execution] of the said Office from any other person then from their Majesties or those whom their Majesties shall appoint on that behalfe”); *id.* § 43 (creating a lottery scheme to raise public funds and providing that “Managers and Directors” of the lottery must “swear that I will faithfully execute the Trust reposed in me And that I will not use any indirect art or meanes or permit or direct any person to use any indirect art or meanes to obtaine a Prize or fortunate Lott for my self or for any other person whatsoever”); An Act for Granting a Subsidy to His Majestie for Supply of His Extraordinary Occasions 1670/71, 22 & 23 Car. 2 c. 3, § 15 (providing that tax assessors must take an oath “well and truely to execute the Duty of an Assessor . . . [and] shall spare noe person for Favour or Affection, nor any person greive for Hatred or ill Will”).

²⁵⁴ See, e.g., An Act for Preventing Dangers Which May Happen from Popish Recusants 1672, 25 Car. 2 c. 2 (imposing loyalty and anti-Catholic oaths and declarations on anyone who received a salary or held any “Command or Place of Trust” from the king, *id.* § 1, except “inferiour Civill Office[s]” like constables, *id.* § 15); An Act for the Encouragement of Trade 1663, 15 Car. 2 c. 7, § 6 (referring to colonial governors as holding a “trust or charge” and requiring an oath to fully implement this navigation act); Corporation Act 1661, 13 Car. 2 c. 1 § 3 (imposing oaths on “persons then bearing any Office or Offices of Magistracy or Places or Trusts or other Employment relating to or concerning the Government of the said respective Cities Corporations and Burroughs and Cinque Ports and their Members and other Port Towns”).

²⁵⁵ See G.E. AYLMEER, THE CROWN’S SERVANTS: GOVERNMENT AND CIVIL SERVICE UNDER CHARLES II, 1660–1685, at 93–94, 101, 110 (2002).

²⁵⁶ See source cited *supra* note 218; see also An Act for the Taking Examining and Stating the Publick Accounts 1695/96, 7 & 8 Will. 3 c. 8, § 2 (commissioners to examine public accounts shall “take an Oath . . . [that] to the best of my Skill and Knowledge I shall faithfully impartially and truly demeane my selfe in examining & taking the Accounts of all such Sum or Sums of Money and other Things brought or to be brought before me in Execution of one Act [this one named] according to the Tenor and Purport of the said Act”).

meaning” of the act.²⁵⁷ The oaths of many officeholders during this period — for example, justices of the peace,²⁵⁸ constables,²⁵⁹ churchwardens,²⁶⁰ auditors of public accounts,²⁶¹ and corporate officers²⁶² — required following governing law and staying within that authority.

This emphasis on faithfulness of the officeholder to legislative supremacy and staying within granted authority created tension between Parliament and the senior-most magistrate in the kingdom, the monarch. The coronation oaths of the Stuart kings (James, Charles, Charles II, James II) contained the promise that they would “keep the Laws and rightful Customs, which the Commonalty of this your Kingdom have.”²⁶³ But divine-rights arch-monarchists like Robert Filmer claimed that this only meant that, “in effect, the King doth swear to keep no Laws, but such as in His Judgment are Upright.”²⁶⁴ Republicans such as Algernon Sidney excoriated these claims. He attacked

²⁵⁷ An Act for Preventing Frauds and Regulating Abuses in the Plantation Trade 1695/96, 7 & 8 Will. 3 c. 22, § 3 (requiring all colonial governors to take a “solemn Oath to doe their utmost that all the Clauses Matters and Things contained [several listed acts of Parliament concerning the plantations and colonies] bee punctually and bona fide observed according to the true intent and meaning thereof”); see also *supra* note 221.

²⁵⁸ THE BOOK OF OATHS AND THE SEVERAL FORMS THEREOF, BOTH ANCIENT AND MODERN 176 (London, H. Twyford et al. 1689) (“[I]n all Articles, in the Kings Commission to you directed, you shall do equal right to the Poor, and to the Rich after your cunning, wit, and power, and after the Laws and Customs of the Realm, and Statutes thereof made.”).

²⁵⁹ *Id.* at 43 (“[Y]e shall keep the peace of our Sovereign Lord the King well, and lawfully after your power . . .” (emphasis added)).

²⁶⁰ ARTICLES OF VISITATION AND INQUIRY CONCERNING MATTERS ECCLESIASTICAL 1 (Warwick-lane [London], A. Baldwin 1700) (reporting that churchwardens and other officials in the Anglican church took oath to “faithfully Execute [their] several Offices . . . according to Law, to the best of [their] Skill and Knowledge”).

²⁶¹ See sources cited *supra* note 256.

²⁶² Grant of London Goldwiredrawers, *supra* note 137, at 132 (providing that the governor of the corporation shall take a corporal oath “well and truly to the uttermost of [their] power execute the office of Governor . . . in all things to the said office appertaining. . . . And that [they] shall well and truly to the uttermost of [their] power observe perform fulfil and keep in all points all such lawful reasonable and wholesome acts statutes laws and ordinances as are or shall from time to time be made by the Governor and Assistants of the said Company for the time being: So help you God”).

²⁶³ THE HISTORY OF PUBLICK AND SOLEMN STATE OATHS, *supra* note 161, at 15 (coronation oath of James I). For Charles I, see THE ENTIRE CEREMONIES OF THE CORONATIONS OF HIS MAJESTY KING CHARLES II AND OF HER MAJESTY QUEEN MARY, CONSORT TO JAMES II 40 (Ashmole & Sandford eds., London, 1761). For Charles II, see *id.* at 12. For James II, see ENGLISH CORONATION RECORDS 296–97 (Leopold G. Wickham Legg ed., 1901).

²⁶⁴ ROBERT FILMER, PATRIARCHA; OR THE NATURAL POWER OF KINGS 96 (London, 1680) (emphasis omitted). In a work written and published when he was James VI of Scotland but not yet king of England, see Charles Howard McIlwain, *Introduction*, in THE POLITICAL WORKS OF JAMES I, at xv, xxxvii (Harvard Univ. Press 1918) (1616), the future King James I wrote that by the coronation oath a Christian king promises “to maintaine all the lowable” — praiseworthy, admirable — “and good Lawes,” THE TREW LAW OF FREE MONARCHIES (1598), reprinted in THE POLITICAL WORKS OF JAMES I, *supra*, at 53, 55.

Filmer for promoting “perjury” and “a detestable practice of annihilating the force of Oaths and most solemn Contracts,” and asserted instead that the English kings “by taking the oath affirm[ed]” that the standing “Laws and Customs” of the country were “upright and good” and had entered into a contract of “mutual obligation” with the people to obey the laws.²⁶⁵ John Locke also wrote against Filmer about the coronation oath and the monarch’s relationship to standing law. Locke slyly drew upon the authority of James I, and quoted at length a 1609 speech to Parliament in which James asserted that the English king “expressly by his oath at his coronation” made a “paction . . . to his people” for “the observation of the fundamental laws of his kingdom,” and that a king becomes a “tyrant[]” and “perjured” unless he keeps his oath and — here Locke paraphrases — “makes the laws the bounds of his power, and the good of the public the end of his government.”²⁶⁶

In keeping with Filmer’s view of the coronation oath, the Stuarts asserted the prerogative to suspend acts of Parliament, in whole or part, and dispense with application of acts of Parliament to specific individuals. The controversy over the dispensing and suspending prerogative peaked during the short reign of James II (1685–88), the second post-restoration monarch. The story starts much earlier, however, with the oaths of supremacy and allegiance imposed under Elizabeth and James I, eventually covering all members of Parliament and all officers and other persons in the king’s service, and effectively barring Catholics and dissenting Protestants from high office.²⁶⁷ Under Charles II, religious tests and oaths were expanded and extended to many lesser offices as well.²⁶⁸

Charles II provoked conflict with Parliament by purporting to suspend some of these laws, before backing down,²⁶⁹ but his brother, James II, a Catholic, chose outright confrontation. He issued wide-ranging dispensations from the laws for certain favored persons, and then broad suspensions.²⁷⁰ In response, leading men in the kingdom invited the Protestant William of Orange from the Dutch Republic — a grandson

²⁶⁵ SIDNEY, *supra* note 168, at 410, 412, 417.

²⁶⁶ JOHN LOCKE, *OF CIVIL GOVERNMENT: SECOND TREATISE* para. 200, at 168–69 (Henry Regnery Co. 1955) (1689).

²⁶⁷ Campbell, *supra* note 212, at 7–8.

²⁶⁸ *See id.* at 9–11.

²⁶⁹ *See* CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND: A DOCUMENTARY CONSTITUTIONAL HISTORY, 1485–1714, at 276–78 (Paul L. Hughes & Robert F. Friesen eds., 1959) (reprinting communications of Parliament denying the king’s power to suspend statutory law).

²⁷⁰ Campbell, *supra* note 212, at 12.

of Charles I who was married to James II's daughter Mary (also a Protestant) — to invade England and assume the crown. James II fled.²⁷¹

As part of the Glorious Revolution, Parliament enacted a new coronation oath. As this statute recalled, previous coronation oaths had “beene framed in doubtfull Words and Expressions” concerning whether the monarch would strictly maintain all “ancient Laws and Constitutions,” or only those with which he or she agreed.²⁷² To counter this evasion, Parliament specified a new, clearer oath, through which William and Mary and subsequent monarchs would be required to pledge as follows: “Will You solemnly Promise and Sweare to Governe the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same? . . . I solemnly Promise soe to doe.”²⁷³ This oath to govern according to law dovetailed with the statement in the Bill of Rights, also adopted as part of the Glorious Revolution settlement between Parliament and the new king and queen, that the monarchy had no prerogative to suspend the laws or dispense with the application of law to any individual.²⁷⁴ Later, foundational statutes reiterated this commitment to parliamentary supremacy.²⁷⁵

Of course, the fact that the English people had for the second time in a half century deposed their king because he had failed to rule for their benefit and according to the laws of the land went a long way toward solidifying the monarch's subordination to the public good as communicated via Parliament.²⁷⁶

²⁷¹ There is an enormous literature on the Glorious Revolution, including two recent, useful works. See RICHARD S. KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* (2014); STEVE PINCUS, *1688: THE FIRST MODERN REVOLUTION* (2009).

²⁷² An Act for Establishing the Coronation Oath 1688, 1 W. & M. sess. 1 c. 6, pmbl.

²⁷³ *Id.* § 3.

²⁷⁴ Bill of Rights 1688, 1 W. & M. sess. 2 c. 2 (“That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlayment is illegall. That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall.”).

²⁷⁵ See An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject 1700/01, 12 & 13 Will. 3 c. 2 (establishing the Protestant succession to the crown through Sophia, granddaughter of James I, wife of the Elector of Hanover, *id.* pmbl., and stating that “the Laws of England are the Birthright of the People thereof and all the Kings and Queens who shall ascend the Throne of this Realm ought to administer the Government of the same according to the said Laws and all their Officers and Minsters ought to serve them respectively according to the same,” *id.* § 4); An Act to Provide for the Administration of the Government 1750/51, 24 Geo. 2 c. 24, § 8 (providing, in the event of a regency by Augusta, Princess Dowager of Wales, that she must take an oath “[t]hat I will truly and faithfully execute the Office of Regent of the Kingdom” and “that I will administer the Government of this Realm, and of all the Dominions thereunto belonging, according to the Laws, Customs and Statutes thereof”); An Act to Provide for the Administration of the Government 1765, 5 Geo. 3 c. 27, § 11 (similar).

²⁷⁶ See generally 1 BLACKSTONE, *supra* note 185, at *156 (describing the “omnipotence” and “absolute despotic power” of Parliament and stating that “[i]t can regulate or new model the succession to the crown; as was done in the reign of . . . William III”). For a helpful monograph on

As Blackstone summarized the state of things brought about by these acts, the king had “the whole executive power of the laws,” a “great and extensive trust.”²⁷⁷ But English law imposed a “limitation [on] the king’s prerogative,” which was “a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws.”²⁷⁸ Thus the Crown must do its duty to execute the laws “in subservience to the law of the land,” this for “the care and protection of the community.”²⁷⁹ The Glorious Revolution settlement also involved Parliament specifying new, simpler versions of the oaths of allegiance and supremacy, which continued to deny the Church of Rome any authority or jurisdiction.²⁸⁰ The coronation oath now also required upholding “the Protestant Reformed Religion Established by Law,”²⁸¹ further cementing the Anglican basis of England’s monarchy and governing class, and making the upholding of statutory law and the established Protestant church keys to the monarch’s execution of office.

It is interesting that the coronation oath does not use the language of faithfulness, or a synonym, when it describes the monarch’s judicial and administrative law execution duties. The part of the Stuarts’ oath concerning execution, which was quite similar to ones dating back to the medieval period, required the king’s assent to the question: “will you, to your Power, cause Law, Justice and Discretion, in Mercy and Truth, to be executed to your Judgment?”²⁸² Neither faithfulness nor a synonym was added by the Glorious Revolution Parliament.²⁸³ Section III.A will discuss the significance of the framers opting not to use the coronation oath as the model for the presidential oath, but instead, adopting the “faithful” language that was commonly used in oaths for mid-level and more ministerial offices.

2. *The Early Settlements of American Colonies.* — The English colonization of America in the seventeenth century called into existence many new polities, corporations, and offices, requiring specified conditions of officeholding. Both authorities in England and the colonists themselves articulated these conditions, which contain important foundational themes and language, some of which ultimately found their way into the

parliamentary supremacy, see generally JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (1999).

²⁷⁷ 1 BLACKSTONE, *supra* note 185, at *257.

²⁷⁸ *Id.* at *137.

²⁷⁹ *Id.* at *183; see also *id.* at *229 (stating that by “contract” with the people of Great Britain, the monarch must “govern according to law”).

²⁸⁰ Bill of Rights 1688, 1 W. & M. sess. 2 c. 2.

²⁸¹ An Act for Establishing the Coronation Oath 1688, 1 W. & M. sess. 1 c. 6, § 3; see also 1 BLACKSTONE, *supra* note 185, at *228 (describing the coronation oath to contain the requirement to “maintain the . . . religion established by the law”).

²⁸² THE HISTORY OF PUBLIC AND SOLEMN STATE OATHS, *supra* note 161, at 15.

²⁸³ See An Act for Establishing the Coronation Oath § 3 (“Will You to Your Power cause Law and Justice in Mercy to be Executed in all Your Judgments.”).

1787 Constitution, including in Article II. Specifically, these new offices often contained directives of faithful performance and taking care that reflected the three precepts of faithfulness we found coalescing in the mid-seventeenth century. Thus, the corporate structure of the colonies not only contributed to the rise of constitutional judicial review,²⁸⁴ but also produced a basis for the inclusion of the “faithful execution” commands in the Constitution.

The earliest royal charters granted for exploration in America by Queen Elizabeth and then King James I were brief documents with no detail about executive management and no oaths. But in the first detailed charter, granted in 1629 by Charles I for Massachusetts Bay, we already see two important components of Article II — to execute office well and faithfully and to govern according to standing law — as well as additional language that prefigures Article II. The charter directed that the governor, along with his deputy and assistants, “shall applie themselves to *take Care* for the best disposing and ordering of the generall buysines and Affaires of, for, and concerning . . . the Government of the People there.”²⁸⁵ The governor and other officers of the company must “take their Corporal Oathes for the due and faithfull Performance of their Duties in their severall Offices and Places.”²⁸⁶ And the executive powers of the governor and other officers could be exercised only according to law, and interpreted according to the intent of the lawgiver.²⁸⁷ Seventeenth-century charters for other colonies in America contained similar provisions.²⁸⁸

From the outset, the colonists were not content to have all of their political and legal arrangements dictated from England. Two colonist-written documents, both of which Professor Donald Lutz describes as “candidate[s] for being the earliest written constitution[s] in America,” “prominently display[] oaths for officeholders as . . . essential part[s] of

²⁸⁴ See Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504 (2006).

²⁸⁵ The Charter of Massachusetts Bay (1629), *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 1846, 1852 (emphasis added).

²⁸⁶ *Id.* at 1854.

²⁸⁷ *Id.* at 1858 (providing that laws and ordinances made for the colony “shalbe carefullie and dulle observed, kept, performed, and putt in Execucon, according to the true Intent and Meaning of the same”).

²⁸⁸ See, e.g., ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA (New London, Conn., Timothy Green 1784), *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 529, 532, 534 (the 1662 Charter of Connecticut requiring officers to take the oaths of supremacy and obedience and a corporal oath “for the due and faithful Performance of their Duties, in their several Offices and Places,” *id.* at 532, and providing that “all such Laws, Statutes and Ordinances, Instructions, Impositions and Directions as shall be so made by the Governor, Deputy-Governor, and Assistants as aforesaid . . . shall carefully and duly be observed, kept, performed, and put in Execution, according to the true Intent and Meaning of the same,” *id.* at 534).

the agreement[s].”²⁸⁹ Both documents bind a governor to faithfully execute his office and the laws for the common good, and to follow the law and stay within authority. The 1636 Pilgrim Code of Law for New Plymouth provided that “[t]he office of the governor . . . consists in the execution of such laws and ordinances as are or shall be made and established for the good of this corporation.”²⁹⁰ The governor’s oath required that:

You shall swear to be truly loyal; also, according to that measure of wisdom, understanding, and discerning given unto you faithfully, equally, and indifferently, without respect of persons, to administer justice in all cases coming before you as the governor of New Plymouth. You shall, in like manner, faithfully, duly, and truly execute the laws and ordinances of the same²⁹¹

The Fundamental Orders of Connecticut (1639) required an oath for the governor binding him:

[T]o promote the publicke good and peace of the [colony], according to the best of [his] skill; as also will mayntayne all lawfull priuiledges of this Commonwealth: as also that all wholesome lawes that are or shall be made by lawfull authority here established, be duly executed; and will further the execution of Justice according to the rule of Gods word²⁹²

Some Protestants from dissenting sects who settled in America objected to oath swearing, believing that it involved the profane taking of the Lord’s name in vain.²⁹³ Yet even those unwilling to take oaths still commanded governors to abide by the laws, stay within their authorizations, and faithfully execute the laws. (Note that Article II later required faithful execution, not only by an oath, but also by an affirmation option and the direct command of the Take Care Clause.) Thus the colony that became Rhode Island, founded by Roger Williams, wrote a frame of government in 1642 that provided that the free men would “make or constitute Just Lawes, by which they will be regulated, and . . . depute from among themselves such Ministers as shall see them faithfully executed between Man and Man.”²⁹⁴ In 1647, the Acts and Orders of the Generall Court of Elections for Providence Colonie (Rhode Island) required that officers, before taking office, “engage” — not swear an

²⁸⁹ COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 210 (Donald S. Lutz ed., 1998).

²⁹⁰ Pilgrim Code of Law (Nov. 15, 1636), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 289, at 61, 63.

²⁹¹ *Id.* at 63–64.

²⁹² Fundamental Orders of Connecticut (Jan. 14, 1639), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 289, at 210, 215.

²⁹³ See DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 5–7 (2006) (“[T]he Mennonites and all Anabaptists advocated the separation of church and state . . . [and] they opposed . . . swearing oaths” *Id.* at 6.); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 28 (1988); *see also supra* notes 8 & 64.

²⁹⁴ Organization of the Government of Rhode Island (Mar. 16–19, 1642), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 289, at 172, 173.

oath — “faithfully and truly to the utmost of your power to execute the commission committed vnto you; and do hereby promise to do neither more nor less in that respect than that which the Colonie [authorized] you to do according to the best of your understanding.”²⁹⁵

For the colony of New Jersey or New Caesarea, the proprietors agreed to a frame of government in 1664 that provided that the governor and his council shall “execute their several duties and offices respectively, according to the laws in force,” and “act and do all other things that may conduce to the safety, peace and well-government of the said Province . . . so as they be not contrary to the laws of the said Province.”²⁹⁶ William Penn wrote a frame of government for his new colony of Pennsylvania that provided that the governor and his council “shall take Care, that all Laws Statutes and Ordinances which shall at any time be made within the said Province be duly and diligently executed.”²⁹⁷ As a Quaker, Penn believed that oaths were profane,²⁹⁸ and his frame did not contain any; instead he used a command that seems to have been copied by Pennsylvanian James Wilson into the Take Care Clause of Article II.

Still, when early colonial outposts created lower offices, they often imposed oaths, affirmations, or commands of faithful execution and faithfulness in following the law. In mid-seventeenth-century Massachusetts Bay, for example, the surveyor of training bands of militia and the general auditor of the colony were both required to take an oath “for the faithfull & diligent execution of his place”²⁹⁹ or “office”³⁰⁰ while a “publicke notary” in the colony took a slightly different oath — that the officeholder “shall demeane yorselfe diligently & faithfully, according to ye duty of yor office . . . without dely or covin,” that is, without delay or fraud.³⁰¹

²⁹⁵ Acts and Orders of 1647, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 289, at 178, 181 (alteration in original).

²⁹⁶ The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and with All and Every the Adventurers and All Such as Shall Settle or Plant There (1664), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 2535, 2539–40.

²⁹⁷ Penn’s Charter of Liberties § 8 (1682), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 3047, 3049; *see also* Frame of Government of Pennsylvania § 6 (1683), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 3064, 3065 (“[T]he Governor . . . shall take care that all laws, statutes and ordinances, which shall, at any time, be made within the said province and territories, be duly and diligently executed.”).

²⁹⁸ Penn was one of the prominent English Quakers involved in publishing a 1675 book describing religious and policy objections to oaths. *See* A TREATISE OF OATHS CONTAINING SEVERAL WEIGHTY REASONS WHY THE PEOPLE CALL’D QUAKERS REFUSE TO SWEAR 194 (Dublin, E. Ray 1713) (1675).

²⁹⁹ 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 74 (Nathaniel B. Shurtleff ed., Boston, William White 1853).

³⁰⁰ *Id.* at 141.

³⁰¹ *Id.* at 209.

D. Mature Governments in Colonial America

There were differences among American colonies in the form of government. For example, in the seventeenth century, some like Pennsylvania were proprietary, with the Crown delegating authority to an individual proprietor or group of proprietors to manage; some like Massachusetts Bay were governed by a chartered joint stock company, also exercising delegated power; and some like New York were controlled directly by the Crown.³⁰² By the eighteenth century, most had been converted to crown colonies.³⁰³ The degrees of self-government allowed to colonists through their elective assemblies also differed somewhat between colonies and over time. But despite these differences, officeholders from the lowest to the highest were bound to faithfully execute their offices and faithfully follow the law.

I. *Governors.* — By the turn of the eighteenth century, when most American colonies had come to be governed directly by the Crown, there was great uniformity in the duties imposed on governors. There was a standard form of the governor's commission, issued through the Privy Council under the monarch's name, with advice of the Board of Trade. Each governor was commanded, *mutatis mutandis*, "to do and execute all Things in due manner that shall belong unto your said Command,"³⁰⁴ to govern according to standing law and directions from the Crown,³⁰⁵ and to take the oaths specified by parliamentary statutes (concerning allegiance to the Crown and support for the Protestant succession), as well as an "Oath for the due Execution of the Office and Trust."³⁰⁶ We

³⁰² For an overview of the different forms of colonial governments in North America, see EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 1–22 (Cambridge, Harvard Univ. Press 1898); Mary Sarah Bilder, *English Settlement and Local Governance*, in 1 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 63 (Michael Grossberg & Christopher Tomlins eds., 2008).

³⁰³ See GREENE, *supra* note 302, at 1; Bilder, *supra* note 302, at 79.

³⁰⁴ Lord Cornbury's Commission, *reprinted in* *THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY* 647, 647 (Aaron Leaming & Jacob Spicer eds., Philadelphia, W. Bradford n.d.).

³⁰⁵ *Id.* at 648 ("according to [the] several Powers and Directions granted or appointed you by this present Commission, and the Instructions and Authorities herewith given you . . . and according to such reasonable Laws and Statutes as shall be made and agreed upon by you, with the advice and consent of the Council and Assembly of our said Province, under your Government").

³⁰⁶ *Id.* For commissions to other governors using the same form and language, see, for example, HIS MAJESTY'S ROYAL COMMISSION TO WILLIAM COSBY 2 (New-York, 1736) (EAI no. 4020); Commission of Benjamin Fletcher to be Governor of New-York (1692), *reprinted in* 3 *DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK* 827, 827–33 (E.B. O'Callaghan ed. & trans., Albany, Weed, Parsons & Co. 1853); Commission of George Clinton, Esq., to be Governor of New-York (1741), *reprinted in* 6 *DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK*, *supra*, at 189, 189–95; Commission of Gov. Benning Wentworth, from His Majesty, George the Third (1760), *reprinted in* 6 *PROVINCIAL PAPERS: DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW-HAMPSHIRE, FROM 1749 TO 1763*, at 908, 909 (Nathaniel Bouton ed., Manchester, N.H., James M. Campbell

read the words “due” or “duly execute” in oaths of office to be synonymous with “faithful” or “faithfully execute” for several reasons. Dictionaries report that the terms were synonyms,³⁰⁷ the words were often paired in oaths of office, and there are many instances where it appears that they are used interchangeably in oaths or commands specifying official duties.³⁰⁸

Commissions for colonial governors were required to be read to the governor’s council and published at the outset of every governor’s time in office, meaning that their content was widely known.³⁰⁹ Due to spotty enforcement of the various navigation acts in the colonies, Parliament also required that all colonial governors take an additional oath to enforce them. The version of the parliamentary oath found in the 1764 Sugar Act (an act loathed by American colonists) demanded that governors “do their utmost” to “punctually and bona fide observe[, according to the true Intent and Meaning thereof]” “all the Clauses, Matters, and Things, contained in any Act of Parliament” concerning the colonies.³¹⁰ Crown records show that the Board of Trade frequently drafted, and the Privy Council sent under the monarch’s name, reminders to colonial governors to take their various oaths of office.³¹¹

2. *Officers of Chartered Corporations.* — In chartered colonies, governors of the colony were corporate officers. Here, we discuss corporations that created municipalities and boroughs, charitable organizations, and business ventures. As in earlier periods, the officers of such chartered corporations continued to be given requirements to faithfully and diligently execute their offices, follow standing law, and stay within authority. It was also frequently specified that misconduct would result in loss of office.

The 1694 Charter of the City of New-York, for instance, required all city officers, recorders, town clerks, clerks of the market, aldermen, assistants,

1872); and Letter from Dunk Halifax et al. to King George III (1761), in 6 THE COLONIAL RECORDS OF NORTH CAROLINA 524, 524–25 (William L. Saunders ed., Raleigh, Josephus Daniels 1888) (proposing commission for Arthur Dobbs to be Governor of North Carolina). Commissions of all the colonial governors of Massachusetts Bay are reproduced at *Index*, COLONIAL SOC’Y MASS., <https://colonialsociety.org/node> [<https://perma.cc/J8AJ-H3P5>].

³⁰⁷ See *supra* section I.C, pp. 2132–34.

³⁰⁸ See, e.g., *infra* notes 313 & 316 and accompanying text.

³⁰⁹ See GREENE, *supra* note 302, at 54; 1 LABAREE, *supra* note 139, § 36, at 16–17; ALVIN RABUSHKA, TAXATION IN COLONIAL AMERICA 121 (2008).

³¹⁰ An Act for Granting Certain Duties in the British Colonies and Plantations in America 1764, 4 Geo. 3 c. 15, § 39 (Sugar Act). A nearly identical oath was required by several earlier navigation acts. See Preventing Frauds and Regulating Abuses in the Plantation Trade 1695/96, 7 & 8 Will. 3 c. 22, § 3; An Act for the Encouragement of Trade 1663, 15 Car. 2 c. 7, § 6; An Act for the Encouraging and Increasing of Shipping and Navigation 1660, 12 Car. 2 c. 18, § 2.

³¹¹ 1 LABAREE, *supra* note 139, §§ 63, 69, 78; 2 *id.* § 925; see also 1 *id.* at viii (noting that the instructions were issued in the name of the monarch, reviewed by the Privy Council, and generally drafted by the Board of Trade).

chamberlains or treasurers, high constables, and petty constables, “[b]efore they, or any of them shall be admitted to enter upon and execute their respective Offices,” to be “sworn, *faithfully to Execute the same*, before the Mayor.”³¹² The mayor and sheriff had to take corporal oaths before the governor and his council “for the due Execution of their respective Offices.”³¹³ The charter for the College of William and Mary in Virginia required that the governing body, called the “Visitors and Governors,” be sworn “well and faithfully to execute the said Office.”³¹⁴ In New Jersey, the charter granted to Queen’s College (today’s Rutgers) by King George III required trustees to “take an oath for faithfully executing the office, or trust reposed in them.”³¹⁵ The 1771 charter for the New-York Hospital in Manhattan (which still serves the city today) required that its officers and governors exercise power “according to the Laws and Regulations” governing the entity and take oaths or make affirmations “for the faithful and due Execution of their respective Offices,” and also granted them the authority to remove officers and physicians who “become unfit or incapable to execute their said Offices, respectively, or shall misdemean themselves in their said Offices, respectively, contrary to any the Bye Laws or Regulations of our said Corporation, or refuse or neglect the Execution thereof.”³¹⁶ And churches were sometimes incorporated, requiring oaths of faithful execution by vestrymen and other officials.³¹⁷

3. *Other Colonial Public Officials.* — In every colony, the assembly created offices and specified by oath or command that officeholders were bound to faithfully execute them. We furnish some illustrative examples here to show the diversity of offices that had these requirements, but we could have chosen hundreds more.

³¹² THE CHARTER OF THE CITY OF NEW-YORK 7 (New-York, 1686) (EAI no. 706).

³¹³ *Id.* at 6–7.

³¹⁴ THE CHARTER AND STATUTES OF THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA 35 (Williamsburg, Va., William Parks 1736) (EAI no. 40109).

³¹⁵ CHARTER OF A COLLEGE TO BE ERECTED IN NEW-JERSEY, BY THE NAME OF QUEEN’S-COLLEGE 4 (New-York, John Holt 1770) (EAI no. 42168).

³¹⁶ CHARTER FOR ESTABLISHING AN HOSPITAL IN THE CITY OF NEW-YORK 7–8, 10 (New-York, H. Gaine 1771) (EAI no. 12161).

³¹⁷ See, e.g., Act for the Establishment of Religious Worship in this Province, According to the Church of England (1701), reprinted in ACTS OF ASSEMBLY, PASSED IN THE PROVINCE OF MARYLAND, FROM 1692, TO 1715, at 13, 14, 16 (London, John Baskett 1723) (requiring that vestrymen take an oath “[t]hat I will justly and truly execute the Trust or Office of a Vestryman of this Parish, according to my best Skill and Knowledge, without Prejudice, Favour or Affection,” *id.* at 14, and churchwardens take an oath “well and faithfully to execute that Office for the ensuing Year, according to the Laws and Usages of the said Province, to the best of his Skill and Power,” *id.* at 16); An Act for Incorporating the Vestry of the Parish of St. Thomas in Berkley County (circa 1733–1736), reprinted in ACTS PASSED BY THE GENERAL ASSEMBLY OF SOUTH-CAROLINA 52, 54 (Charles-Town, Lewis Timothy 1736) (providing that vestrymen must take an oath “that I will well and faithfully execute the Office . . . and to the utmost of my Power, observe and follow the Directions of the Act of the General Assembly [this act named]”).

In Massachusetts, for example, the gager of casks swore an oath to “diligently and faithfully discharge and execute the Office of a Gager . . . impartially without Fear or Favour,”³¹⁸ and managers of the Massachusetts public lottery had a detailed oath to faithfully execute, eschew corruption, and follow the intent of the legislature,³¹⁹ as did lottery managers in other colonies like New York.³²⁰ The Rhode Island assembly required the general treasurer of the colony to post bond “for the faithful Execution of his Office, and the Trust reposed in him,”³²¹ while trustees charged with making loans with government-issued bills of credit were required to “give personal Security” “to the Amount of the several Sums by them receiv’d, for the faithful Execution of their Trust and Office.”³²² In Connecticut, constables,³²³ town clerks,³²⁴ sergeants major of the militia,³²⁵

³¹⁸ An Act to Prevent Deceit in the Gage of Cask (1747), *reprinted in* ACTS AND LAWS OF HIS MAJESTY’S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND 52, 53 (n.p. 1763).

³¹⁹ An Act for Raising by a Lottery the Sum of Seven Thousand and Five Hundred Pounds for the Service of this Province in the Present Year (1744), *reprinted in* ACTS AND LAWS, PASSED BY THE GREAT AND GENERAL COURT OR ASSEMBLY OF HIS MAJESTY’S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND 142, 145 (Boston, Kneeland & Green 1745) (“I will faithfully execute the Trust reposed in me, and . . . I will not use any indirect Art or Means to obtain a Prize or Benefit-Lot for my self or any other Person whatsoever . . . and . . . I will, to the best of my Judgment, declare to whom any Prize, Lot or Ticket does of Right belong, according to the true Intent and meaning of the Act of this Province made in the eighteenth Year of His Majesty’s Reign in that Behalf. So help me God.”) (EAI no. 5628).

³²⁰ An Act for Ratifying the Sum of Two Thousand Two Hundred and Fifty Pounds, by a Publick Lottery for this Colony, for the Advancement of Learning, and Towards the Founding a College Within the Same (1746), *reprinted in* ANNO REGNI GEORGII II. REGIS MAGNAE BRITANNIAE, FRANCIAE, & HIBERNIAE, VICISSIMO 37, 41 (New-York, James Parker 1746).

³²¹ An Act Stating the General Treasurer’s Salary, and for Taking Security (1729), *reprinted in* ACTS AND LAWS, OF HIS MAJESTY’S COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS, IN NEW-ENGLAND, IN AMERICA 146, 146 (Newport, Franklin 1745) (EAI no. 5683).

³²² An Act for Promoting the Raising Flax and Wool, and Manufacturing the Same into Cloth (1750), *reprinted in* AT THE GENERAL ASSEMBLY OF THE GOVERNOR AND COMPANY OF THE ENGLISH COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS, IN NEW-ENGLAND, IN AMERICA 77, 78 (Newport, 1751) (EAI no. 40604).

³²³ An Act for the Establishing Forms of Oaths, *reprinted in* ACTS AND LAWS, OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND 89 (Boston, Bartholomew Green & John Allen 1702) (requiring an oath that “you will faithfully Execute the place and Office of a Constable . . . and will do your best endeavor to see all Watches and Wards executed and duly attended, and obey and execute all lawful Commands and Warrants . . . as shall be committed to your care, according to your best skill”).

³²⁴ *Id.* (requiring an oath that “you will truly and faithfully attend and execute the place and Office of a Town Clerk . . . according to your best skill: and make Entry of all such Grants, Deeds of Sale, or of Gift, Town Votes, Mortgages and Alienations of Land, as shall be compleated according to Law”).

³²⁵ *Id.* at 87 (requiring an oath that “according to your Commission, you Swear by the Ever-living God, that according to your best skill and ability, you will faithfully discharge the trust committed to you, and according to such Commands and directions as you shall receive from time to time, from the General Court, and Governour and Council, and according to the Laws and Orders of this Colony”).

fence viewers,³²⁶ tything men,³²⁷ and many other officials took oaths to faithfully discharge or execute their office.

In Pennsylvania, the keeper of an almshouse was required to give bond with sureties “for the due and faithful Execution of his Office, and for the Care and good Management of what shall be committed to his Trust,”³²⁸ while the register general for probating wills and granting letters of administration had to give bond with sufficient sureties “for the true and faithful Execution of his Office, and for the delivering up the Records, and other Writings belonging to the said Office.”³²⁹ The Delaware assembly required the recorder of deeds to post bond, with at least one surety, “conditioned for the true and faithful Execution of his Office, and for delivering up the Records and other Writings belonging to the said Office.”³³⁰ Sheriffs in Maryland had to post bond, the “Condition” of which was that they “well and faithfully execute the same Office; and also shall render His said Majesty, and His Officers, a true, faithful, and perfect Account of all and singular His said Majesty’s Rights and Dues . . . [and] a true and just Account of their Fees.”³³¹

In Virginia, a surveyor of land took an oath to “truly and faithfully, to the best of His Knowledge and Power, discharge and execute his Trust, Office, and Employment,” and enter into bond with sureties “for the true and faithful Execution and Performance of his Office.”³³² In

³²⁶ This officer administered fence laws and settled disputes about fencing — for example, involving escaped livestock. For the oath, see *id.* at 89 (requiring an oath to “diligently and faithfully discharge and execute the Office”).

³²⁷ This was a low-level elected office in England and New England, charged with overseeing the conduct of neighbors, policing taverns for drunkenness and rowdy behavior, and the like. For the oath, see An Act for Prescribing, and Establishing Forms of Oaths in This Colony, *reprinted in* ACTS AND LAWS OF HIS MAJESTY’S ENGLISH COLONY OF CONNECTICUT IN NEW-ENGLAND IN AMERICA 175, 181 (New London, Conn., Timothy Green 1750) (requiring an oath to “faithfully Execute the Place, and Office . . . Impartially according to Law, without Fear, or Favour, according to your best Skill, and Knowledge”).

³²⁸ An Act for Amending the Laws Relating to the Poor, *reprinted in* ANNO REGNI GEORGII II. REGIS, MAGNAE BRITANNIAE, FRANCIAE & HIBERNIAE, VIGESIMO TERTIO. AT A GENERAL ASSEMBLY OF THE PROVINCE OF PENNSYLVANIA 98, 104 (Philadelphia, B. Franklin 1749) (EAI no. 6395).

³²⁹ An Act Concerning the Probates of Written and Nuncupative Wills, and for Confirming Devices of Lands, c. XIX, *reprinted in* THE LAWS OF THE PROVINCE OF PENNSYLVANIA COLLECTED INTO ONE VOLUME 45, 47–48 (Philadelphia, Andrew Bradford 1714).

³³⁰ An Act for Acknowledging and Recording Deeds, *reprinted in* LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX UPON DELAWARE 207 (Philadelphia, B. Franklin 1741).

³³¹ An Act for the Direction of the Sheriff’s Office, and Restraining Their Ill Practices Within this Province, *reprinted in* ACTS OF ASSEMBLY, PASSED IN THE PROVINCE OF MARYLAND, FROM 1692, TO 1715, *supra* note 317, at 179.

³³² An Act Directing the Duty of Surveyors of Land, ch. XIV (1748), *reprinted in* THE ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA (Williamsburg, W. Rind, A. Purdie & J. Dixon 1769) (EAI no. 11511).

North Carolina, officers such as searchers for weapons among slaves,³³³ collectors of liquor duties,³³⁴ sheriffs,³³⁵ and commissioners to oversee the emission of public bills of credit³³⁶ took oaths or posted bonds to faithfully execute their offices. South Carolina also created many offices with that requirement, including the pilot of Charles-Town harbor,³³⁷ surveyors of hemp, flax, and silk,³³⁸ and the “public packer” of beef and pork for export.³³⁹ And finally, in the southern-most colony of Georgia, officers, such as the harbor master of Savannah and the “culler and inspector of lumber,” took oaths of faithful execution as a condition of assuming office.³⁴⁰

³³³ An Additional Act, to an Act, Concerning Servants and Slaves (1753), *reprinted in* 2 A COLLECTION OF ALL THE ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE 16 (Newbern, N.C., James Davis 1765) (requiring an oath to “faithfully . . . discharge the Trust reposed in me, as the Law Directs, to the best of my Power”).

³³⁴ An Act, for Granting to His Majesty, the Sum of Forty Thousand Pounds (1754), *reprinted in* 2 A COLLECTION OF ALL THE ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE, *supra* note 333, at 18, 25 (requiring posting bond “with Condition, that he will honestly, faithfully, and justly execute the Office . . . and will fully account for and pay all such Sum or Sums of Money by him to be received and accounted for”).

³³⁵ An Act, for Appointing Sherifs, and Directing Their Duty in Office (1754), *reprinted in* 2 A COLLECTION OF ALL THE ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE, *supra* note 333, at 60, 61 (“I will, truly and faithfully, execute the Office of Sheriff of the County of [] to the best of my Knowledge and Ability, agreeable to Law; and that I will not take, accept, or receive, directly or indirectly, any Bribe, Gift, Fee or Reward, whatsoever, for returning any Man to serve as a Juror . . . or for making any false Return of Process to me directed . . .”).

³³⁶ An Act for Granting to His Majesty, the Sum of Forty Thousand Pounds in Public Bills of Credit, ch. 1, § 6 (1754), *reprinted in* ANNO REGNI GEORGII II, REGIS, MAGNAE BRITANNIAE, FRANCIAE, & HIBERNIAE, VICESIMO SEPTIMO, AT A GENERAL ASSEMBLY, HELD AT WILMINGTON (requiring that commissioner “shall, before he enters upon the Execution of his Office, give Bond . . . for the due and faithful Execution of his Office, according to the true Intent and Meaning of this Act . . . and also shall take an Oath, for the due and faithful Execution of his Office of Commissioner aforesaid”) (EAI no. 7283).

³³⁷ An Act for the Better Settling and Regulating of Pilots, and for Erecting and Supporting of Beacons near the Barr and Harbour of Charles-Town (1734), *reprinted in* 2 THE LAWS OF THE PROVINCE OF SOUTH-CAROLINA, IN TWO PARTS 610, 611 (Nicholas Trott ed., Charles-Town, Lewis Timothy 1736) (“I will well and faithfully execute and discharge the Business and Duty of a Pilot . . .”).

³³⁸ An Act for Encouraging the Raising of Hemp, Flax and Silk, ch. VI, *reprinted in* ACTS PASSED BY THE GENERAL ASSEMBLY OF SOUTH-CAROLINA 40, 41 (Charles-Town, Lewis Timothy 1736) (requiring an oath to “well & faithfully execute your said Office, after your best Skill and Cunning, with all Fidelity, and without any Partiality, Favour or Affection”).

³³⁹ An Act to Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rolin, Turpentine, Beef, Pork, Shingles, Staves, and Fire-wood (1746), *reprinted in* THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790, INCLUSIVE 208, 210 (Philadelphia, R. Aitken & Son 1790) (“I will faithfully and impartially execute the business and duty of a packer . . . without favour or prejudice to any person or party whatever, according to the best of my skill and judgment, and with the greatest expedition.”).

³⁴⁰ See An Act to Regulate and Ascertain the Rates of Wharfage of Shipping and Merchandize, § 7 (1770), *reprinted in* ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 488, 492 (Savannah, James Johnston 1770) (“I will, to the best of my skill, knowledge, and ability, without partiality or prejudice, execute the office, and perform the duty of Harbour-Master . . . as directed

4. *Summing Up.* — As in prior eras of English history, during the period of mature colonial governments in America the concept of faithful execution was frequently linked with adjectives (or adverbs, as the case may be) such as true, diligent, due, honest, well, skillful, careful, and impartial. This period was also consistent in showing that faithful execution was often tied to staying within authority and abiding by the law,³⁴¹ following the intent of the lawgiver,³⁴² and eschewing self-dealing and financial corruption.³⁴³ This tripartite meaning of faithful execution is consistent for both English and colonial office-holding.

One might argue, perhaps invoking the modern interpretive canon against surplusage, that seeing many oaths of faithful execution that also mention, for example, a rule against self-dealing is evidence that faithful execution does not itself prohibit self-dealing. We disagree. Prolixity, often including lots of repetition and surplusage, was the norm in early modern legal drafting. When one sees concepts repeatedly occurring together, that might just as well indicate similarity as difference in their meaning. In addition, dictionary definitions of faithful include the three strands we found. And finally, as discussed below, criminal and civil case law concerning officeholder duties and parliamentary impeachments is additional evidence that faithfully executing an office had come to have the three-part meaning we ascribe to it.

Throughout the eighteenth century, Parliament continued to create many executive offices with attached duties of faithful execution, frequently paired with these tripartite features, too. Many of these were internal acts that did not directly affect the overseas colonies³⁴⁴ —

in and by an act of the General Assembly entitled [this act named].”); An Act to Regulate the Making of Cypress, Oak, and Pine Lumber, Staves and Shingles (1767), *reprinted in* ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 6, 7–8 (Savannah, James Johnston 1767) (imposing oath that “I will faithfully, impartially, and without delay, execute the business and duty of a culler and inspector of lumber . . . to the best of my skill and judgment, agreeable to an act of the general assembly [this act named]”) (EAI no. 41715).

³⁴¹ See sources cited *supra* notes 305, 317, 325, 327 & 333.

³⁴² See sources cited *supra* notes 319 & 336.

³⁴³ See sources cited *supra* notes 319, 331, 334 & 335.

³⁴⁴ See, e.g., An Act for the Better Carrying on and Regulating the Navigation of the Rivers Thames and Isis 1750/51, 24 Geo. 2 c. 8 (“I A. B. do swear, That I will without Favour or Affection, truly, faithfully and impartially execute, perform and discharge the Office and Duty of a Commissioner, according to the Powers, Authorities and Directions given and established by an Act of Parliament [this act named] according to the best of my Skill and Knowledge.”); An Act for the Better Regulating the Office of Sheriffs and for Ascertaining Their Fees 1716/17, 3 Geo. c. 15, § X (imposing a new oath on sheriffs, including this provision: “I will truly and diligently execute the good Laws and Statutes of this Realm . . . and discharge the same according to the best of my Skill and Power.”); An Act for Laying Certain Duties Upon Candles 1709, 8 Ann. c. 5, § 52 (“I will faithfully execute the Trust reposed in me pursuant to the Act of Parliament [this act named] without Fraud or Concealment and shall from time to time true Account make of my doings therein . . . and shall take no Fee Reward or Profit for the Execution or Performance of the said Trusts or the Business relating thereto from any Person or Persons other than such as shall be paid or allowed by Her Majesty . . .”).

though they did generate complaints that resonated with colonial American concerns about the multiplication of crown offices, the corruption of members of Parliament and others by being given lucrative offices, and the growth of executive power.³⁴⁵ But some were important statutes governing the colonies that attracted widespread attention in America, such as the Stamp Act.³⁴⁶ In addition, extant laws from earlier centuries, such as those parliamentary statutes banning sales of office and corruption in official appointments, and those requiring all excise and customs officers to truly and faithfully execute their offices,³⁴⁷ continued to shape the law, culture, and politics of officeholding and helped define what it meant to be a faithful officer.

Both civil and criminal case law and Parliamentary impeachments also helped to define faithfulness in office. At common law, “any public officer” was “indictable for misbehaviour in his office,”³⁴⁸ or could be pursued by criminal information at the suit of the Crown or a private prosecutor.³⁴⁹ The misdemeanors — failures to demean oneself appropriately in public office — that were actionable included knowing neglect of duty,³⁵⁰ peculation,³⁵¹ exercising official discretion with a “corrupt”³⁵² or “partial motive”³⁵³ rather than pursuing the public interest, and a breach of trust, such as taking a bribe to recommend a candidate for a crown office.³⁵⁴ Extortion was also a crime, “which consist[ed] in any officers’ unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.”³⁵⁵

³⁴⁵ See EDLING, *supra* note 91, at 64–65; WOOD, *supra* note 7, at 143–46.

³⁴⁶ An Act for Granting Certain Stamp Duties, and Other Duties, in the British Colonies and Plantations in America 1765, 5 Geo. 3 c. 12, § 12 (Stamp Act) (providing that commissioners and other officers who will execute the act “shall take an Oath in the Words, or to the Effect following (that is to say) ‘I A. B. do swear, That I will faithfully execute the Trust reposed in me, pursuant to an Act of Parliament [this act named], without Fraud or Concealment; and will from time to time true Account make of my Doing therein . . . ; and will take no Fee, Reward, or Profit, for the Execution or Performance of the said Trust, or the Business relating thereto, from any Person or Persons, other than such as shall be allowed by his Majesty, his Heirs, and Successors, or by some other Person or Persons under him or them to that Purpose authorized’”).

³⁴⁷ See *supra* notes 216 & 219.

³⁴⁸ Anonymous (1704) 87 Eng. Rep. 853, 853; 6 Mod. 96, 96.

³⁴⁹ See, e.g., Bassett v. Godschall (1770) 95 Eng. Rep. 967, 968; 3 Wils. K.B. 121, 123.

³⁵⁰ See, e.g., Crouther’s Case (1599) 78 Eng. Rep. 893, 894; Cro. Eliz. 654, 654–55 (involving a constable who refused to make the hue and cry).

³⁵¹ Queen v. Buck (1704) 87 Eng. Rep. 1046, 1046; 6 Mod. 306, 307 (involving defendant tax assessors and collectors who imposed an “inequality of rates for the private advantage of some” and “put the money in their own pockets”).

³⁵² Rex v. Hann (1765) 97 Eng. Rep. 1062, 1062; 3 Burr. 1716, 1716.

³⁵³ Rex v. Justices of the Peace of the Corp. of Rye (1752) 96 Eng. Rep. 791, 791; Sayer 25, 26.

³⁵⁴ Rex v. Vaughan (1796) 98 Eng. Rep. 308, 310; 4 Burr. 2495, 2498. On the crime of misbehavior in public office, see RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 63–66 (1973).

³⁵⁵ 4 BLACKSTONE, *supra* note 185, at *141.

Civil actions could also be used to remove an officer who himself failed, or whose inferior failed, to take or abide by his oath of office. For instance, in 1767, a Pennsylvania court upon petition removed a recorder of deeds who had farmed his office to a deputy without ensuring that the deputy “was under any Oath of Office” or had “given any Security for the faithfull Discharge of [the] Office.”³⁵⁶

In addition to judicial proceedings, widely noticed impeachments also conveyed information about the contours of faithful officeholding. As noted above, these examples reflect a public trust theory of impeachment, in which acting contrary to oath, duty, and office are key elements.³⁵⁷ For instance, Thomas Parker, Earl of Macclesfield, the Lord High Chancellor of Great Britain, was impeached for allowing the misappropriation of court and litigant property in his chancery office.³⁵⁸ Macclesfield was deemed to have failed in “the faithful vigorous Discharge of the great Trust reposed” in him, having breached his oath of “due and faithful discharge and execution of [his] Duty.”³⁵⁹

As the concept of faithful execution gained definition and coherence in the legal and political realms, it also radiated out into the larger culture, in which it was likely to have been understood in a looser, colloquial sense. Translations of Greek and Roman classics used the term to describe diligent, honest, or otherwise praiseworthy behavior by public agents.³⁶⁰ Sir Walter Raleigh’s *History of the World*, written during his

³⁵⁶ Petition of Parr (Phila. Cty. Pa. Quarter Sess. Ct. Sept. 1767) (manuscript in possession of Philadelphia City Archives and digital photographs on file with authors); see WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE*, 1735–1776, at 70 (2018).

³⁵⁷ See *supra* p. 2151; see also BERGER, *supra* note 354, at 67–70 (reviewing English impeachments and noting themes including “corruption,” “abuse of official power,” “misapplication of funds,” and “neglect of duty,” *id.* at 70).

³⁵⁸ See Joshua Getzler, *Fiduciary Principles in English Common Law*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW*, *supra* note 35, at 471.

³⁵⁹ The Trial of Thomas, Earl of Macclesfield, Lord High Chancellor of Great Britain, Before the House of Lords, for High Crimes and Misdemeanors in the Execution of his Office (May 6, 1725), in 6 *A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS UPON HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANORS* 477, 618, 659 (London, 3d ed. 1742). In 1771, historians uncovered the secret Treaty of Dover of 1670, which revealed bad faith by chief executives: Charles II and James II received bribes from France’s Louis XIV and promised secret conversion to Catholicism and to enter a military alliance. See Jed Handelsman Shugerman & Gautham Rao, *Emoluments, Zones of Interests, and Political Questions: A Cautionary Tale*, 45 *HASTINGS CONST. L.Q.* 651, 661 (2018).

³⁶⁰ See, e.g., CICERO AGAINST CATILINE, in IV. *INVECTIVE ORATIONS. CONTAINING THE WHOLE MANNER OF DISCOVERING THAT NOTORIOUS CONSPIRACY*. 93 (Christopher Wase trans., London, T.N. 1671) (stating that Lucius Valerius Flaccus and Caius Pomptinus, the praetors at the time of Cataline’s conspiracy, “are deservedly and justly praised; because they had courageously and faithfully executed what I committed to their Charge”); *THE HISTORY OF POLYBIUS THE MEGALOPOLITAN: THE FIVE FIRST BOOKES ENTIRE* 293 (Edward Grimeston trans., London, Nicholas Okes 1634) (describing the organizing of the Roman legion: “[E]very Tribune draws together his Legion, and in choosing one of the most sufficient, they take an Oath from him

imprisonment in the Tower of London, described the ideal deportment of governors of ancient Athens as “faithful execution of that which was committed to them in trust.”³⁶¹ And John Donne, the poet, scholar, and churchman, praised a “Good Minister” as one who “faithfully execute[s] the office of his Ministrie.”³⁶² By the eighteenth century, faithful execution was widely used to describe the proper role of a magistrate — to duly, impartially, and vigorously execute the laws.³⁶³

E. The Revolution and the Critical Period

The importance of oaths to Americans can be seen clearly during the break from Great Britain. Among the first things that new state governments did after independence were to set up new governments — sometimes temporary, sometimes more durable — and require oaths of allegiance and faithful execution for state officials. During the War for Independence and after, many states also legislated new oaths for citizens, abjuring any allegiance to King George III and Great Britain, and pledging allegiance to the new state and, sometimes, the United States as well.³⁶⁴ Over the next few years, as state governments matured, every state created many offices that had faithful execution oaths or affirmations. The national government also created offices with faithful execution obligations.

to obey his Captaines faithfully, and to execute their Commandments”); PLINY THE ELDER, *THE HISTORIE OF THE WORLD* 178 (Philemon Holland trans., London, Adam Islip 1634) (discussing the “faithfull execution of his Censorship” by a Roman official).

³⁶¹ WALTER RALEIGH, *The Third Book of the First Part, in THE HISTORY OF THE WORLD* 419 (London, 1687).

³⁶² JOHN DOWNE, *An Amulet or Preservative Against the Contempt of the Ministry, in CERTAINE TREATISES OF THE LATE REVEREND AND LEARNED DIVINE, MR JOHN DOWNE* 26 (Oxford, John Lichfield 1633).

³⁶³ See, e.g., A LETTER TO A MEMBER OF PARLIAMENT, ON THE IMPORTANCE OF THE AMERICAN COLONIES 21 (London, Black Swan 1757) (“[L]et us not forget the Government that is best administered is best, in a proper Care to appoint such Officers as will faithfully execute the Laws, and punish those that neglect their Duty.”); WILLIAM VINAL, SERMON ON THE ACCURSED THING THAT HINDERS SUCCESS AND VICTORY IN WAR 6 (Newport, R.I., James Franklin 1755) (“[A] vigorous and faithful Execution of the Laws of the Country . . . is the Magistrate’s Province.”); JOHN WEBB, *THE GREAT CONCERN OF NEW-ENGLAND: A SERMON PREACHED AT THE THURSDAY LECTURE IN BOSTON, FEBRUARY 11TH. 1730*, at 31 (Boston, Thomas Fleet 1730) (“[T]he best Body of Laws, without a *faithful Execution of them*, will necessarily prove *ineffectual*.”).

In databases of eighteenth-century legal materials — such as Gale’s Eighteenth Century Collections and Virginia’s Founders Early Access — search results for the term “faithful execution” (and variants) are dominated by references to public offices and oaths. Somewhat less common were uses in private contexts that we would now call fiduciary instruments, like wills and guardianship. Least common was use in ordinary private contracts. These findings come with the caveat that these databases are not clearly representative of the era, so these observations are offered in a tentative and confirmatory spirit.

³⁶⁴ For a rich discussion, see HYMAN, *supra* note 59, at 61–117.

I. *Chief Magistrates of the Newly Independent States.* — Most relevant for purposes of understanding Article II, the states through constitutions and statutes created chief magistrates — generally called governors or presidents — to be the primary executive officials. These officers, along with the British monarch and colonial governors, are the most probable models for the presidency that were in the minds of the drafters of Article II. We have already seen that oaths of office were critical for the monarch and colonial governors. The monarch was required to pledge during the coronation oath to govern according to parliamentary statutes. An oath-bound requirement to follow standing law was also required of colonial governors, who in addition pledged to duly execute their offices. Nearly every state replicated these requirements for their governors. The only exceptions were the two “charter states” of Connecticut and Rhode Island, which did not draft new constitutions but simply continued under their old charters, with some updated laws.³⁶⁵ All of the remaining states, plus one entity that was not yet a state — Vermont — imposed by law the twin securities on the executive power later found in Article II: requiring that the chief magistrate govern according to law and take an oath of faithful execution of office.

One of the first states to act was Virginia. In the spring of 1776, before independence was formally declared,³⁶⁶ a general convention met and passed an ordinance prescribing the oath of office for the Virginia governor and other officials:

I will, to the best of my skill and judgment, execute the said office diligently and faithfully, according to law, without favour, affection, or partiality; that I will, to the utmost of my power, support, maintain, and defend, the commonwealth of Virginia, and the constitution of the same . . . and will constantly endeavour that the laws and ordinances of the commonwealth be duly observed, and that law and justice, in mercy, be executed in all judgments.³⁶⁷

The state’s new constitution, drafted soon afterward in the summer of 1776, provided that the governor “shall, with the advice of a Council of State, exercise the executive powers of government, according to the

³⁶⁵ HANNIS TAYLOR, *THE ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION* 23 (Boston & New York, Houghton, Mifflin & Co. 1890) (“The charter granted to Connecticut by Charles II. in 1662 was continued as her organic law until 1818; while the charter granted in 1663 to Rhode Island was continued as her organic law down to 1842.”).

³⁶⁶ On May 15, 1776, the Continental Congress resolved that governments should be formed “under the authority of the people of the colonies.” 4 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 142, at 358. This spurred states to begin deliberating about new constitutions.

³⁶⁷ An Ordinance Prescribing the Oaths of Office to be Taken by the Governour and Privy Council, and Other Officers of the Commonwealth, *reprinted in* ORDINANCES PASSED AT A GENERAL CONVENTION OF DELEGATES AND REPRESENTATIVES, FROM THE SEVERAL COUNTIES AND CORPORATIONS OF VIRGINIA, HELD AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, ON MONDAY THE 6TH OF MAY, ANNO DOM: 1776, at 13, 13 (Williamsburg, Va., Alexander Purdie 1776) (EAI no. 15199).

laws of this Commonwealth.”³⁶⁸ The famous Bill of Rights of Virginia contained a declaration against execution, suspension, or dispensation of the laws,³⁶⁹ which reappeared in near-identical language in the later constitutions of Maryland, North Carolina, Massachusetts, and New Hampshire.³⁷⁰

Other states, such as Delaware in fall 1776³⁷¹ and Maryland in late 1776,³⁷² followed with constitutions and statutes requiring that the chief magistrate govern according to standing law and take an oath of faithful execution of office. Many of the early state constitutions were heavily slanted toward legislative power, giving selection of the chief magistrate to the legislature, and requiring consultation and sometimes approval of a council before the chief magistrate could take certain acts. Pennsylvania probably had the least powerful chief magistrate, because that officer merely headed an executive committee: “The supreme executive power shall be vested in a president and council.”³⁷³ “The president . . . with the council . . . are to correspond with other states, and transact business with the officers of government, civil and military; . . . they are also to take care that the laws be faithfully executed”³⁷⁴ The president and council, along with other government officers, were required by the constitution to swear or affirm “that I will faithfully execute the office of [office named] . . . and will do equal right and justice to all men, to the best of my judgment and abilities, according to law.”³⁷⁵

³⁶⁸ VA. CONST. of 1776, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 3812, 3816.

³⁶⁹ VA. CONST. of 1776 (Bill of Rights), § 7, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 3812, 3813 (“That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”).

³⁷⁰ See MD. CONST. of 1776 (Declaration of Rights), § VII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 1686, 1687; MASS. CONST. of 1780, pt. 1, art. XX, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 1888, 1892; N.C. CONST. of 1776 (Declaration of Rights), § V, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 2787, 2787; N.H. CONST. of 1784, pt. I, art. XXIX, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 2453, 2457.

³⁷¹ DEL. CONST. of 1776, arts. 7 & 22, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 562, 563, 566; 6 PAPERS OF THE HISTORICAL SOCIETY OF DELAWARE: MINUTES OF THE COUNCIL OF DELAWARE STATE FROM 1776 TO 1792, at 210 (Wilmington, Historical Society of Delaware 1887) (oath of President Cæsar Rodney, taken April 2, 1778); *see also id.* at 676, 679 (same oath taken by President John Dickinson on November 13, 1781).

³⁷² MD. CONST. of 1776, art. XXXVIII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 1686, 1697; An Act to Direct the Forms of the Commissions to the Judges and Justices, ch. 5 (1777), *reprinted in* 1 THE LAWS OF MARYLAND 323, 323 (Virgil Maxcy ed., Baltimore, Philip H. Nicklin & Co. 1811).

³⁷³ PA. CONST. of 1776, § 3, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 3081, 3084.

³⁷⁴ *Id.* § 20, at 3087–88.

³⁷⁵ *Id.* § 40, at 3090.

Two important constitutions that gave more power and independence to chief executives — including an independent electoral base — and thus provided models for the presidency were those of New York (1777) and Massachusetts (1780). But both states had the same restrictions on gubernatorial power: a faithful execution requirement and a directive to enforce and abide by the law.³⁷⁶ Like Pennsylvania and Vermont,³⁷⁷ New York used the language “take care that the laws are faithfully executed” to command its chief magistrate to enforce and follow the law.³⁷⁸

States made choices that differed from one another, and from the choices made by drafters of Article II in 1787, about whether the chief magistrate should preside alone, or with the mere advice of a council, or only with the approval of a council; by whom and for how long a term the chief magistrate would be elected; whether that officer could serve multiple terms; and whether the chief magistrate would have no power, a qualified power, or an absolute power to veto legislation or to pardon convicted criminals. But all states agreed that a chief magistrate should be under oath to faithfully execute the office, should be required to both abide by and faithfully apply the law, and had no power to suspend the

³⁷⁶ MASS. CONST. of 1780, pt. 2, ch. II, § 1, arts. I & IV, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 1888, 1899–1900 (providing that the governor, called the “supreme executive magistrate,” *id.* art. I, would, along with his council, “order[] and direct[] the affairs of the commonwealth, agreeably to the constitution and the laws of the land,” *id.* art. IV); *id.* pt. 2, ch. VI, art. I, at 1909 (requiring the governor and other state officers to take an oath (or affirmation if Quaker) to “faithfully and impartially discharge and perform all the duties incumbent on me . . . according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of the commonwealth. So help me, God.”); N.Y. CONST. of 1777, arts. XVII & XIX, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 2623, 2632–33 (providing that “the supreme executive power and authority of this State shall be vested in a governor,” *id.* art. XVII, who shall “take care that the laws are faithfully executed to the best of his ability,” *id.* art. XIX); Plan for Organizing the Government, *in* 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK, 1775–1776–1777, at 916–17 (Albany, Thurlow Weed 1842) (requiring the governor, before taking office, to take an oath “in the presence of that Almighty and eternal God,” to swear “that I will in all things, to the best of my knowledge and ability, faithfully perform the trust, so as aforesaid reposed in me, by executing the laws, and maintaining the peace, freedom, honour and independence of the said State, in conformity to the powers unto me delegated by the constitution”); An Act Requiring All Persons Holding Officers or Places Under the Government of this State, to Take the Oaths, Therein Described and Directed, ch. 7, § 2 (Mar. 5, 1778), *reprinted in* LAWS OF THE STATE OF NEW-YORK, COMMENCING WITH THE FIRST SESSION OF THE SENATE AND ASSEMBLY AFTER THE DECLARATION OF INDEPENDENCY 8 (Poughkeepsie, N.Y., John Holt 1782) (providing that future governors and lieutenant governors shall take an oath to “faithfully perform the Trust reposed in me, as [office named], by executing the Laws, and maintaining the Peace, Freedom and Independence of the said State, in Conformity unto the Powers delegated unto me by the Constitution of the said State. So help me God.”).

³⁷⁷ VT. CONST. of 1777, ch. II, § XVIII, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 3737, 3745.

³⁷⁸ N.Y. CONST. of 1777, art. XIX, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 138, at 2623, 2633.

laws or dispense with their application to specific persons.³⁷⁹ These requirements replicate what was imposed on colonial governors and the British monarch, with the exception that the coronation oath did not use the specific language of faithful or due execution. When the framers expressly required that the President faithfully execute his office and the laws, they almost certainly imported the same package of restrictions into Article II, with all the meaning it had acquired over the centuries.

2. *Executive Offices Created by the Continental Congress.* — In looking for models for Article II, the framers also must have considered important executive offices created by the Continental/Confederation Congress in 1774–1787. The Congress repeatedly created executive offices with faithful execution duties, used oaths and affirmations to solidify those obligations, and specified or implied that faithful execution included abiding by standing law, staying within authority, and refraining from self-dealing.

Even before independence, the Continental Congress created offices such as “treasurers of the United Colonies,” who were required to “give bond . . . for the faithful performance of their office,”³⁸⁰ and a paymaster general and quartermaster general for the army, who were on oath “truly and faithfully to discharge the duties of their respective stations.”³⁸¹ In October 1776, the Congress ordered that all officers of the Continental Army take an oath pledging allegiance to the thirteen colonies, abjuring allegiance to King George III, and promising “to the utmost of my power, [to] support, maintain, and defend” the United States³⁸² — language sounding very similar to the second part of the President’s oath of Article II. Some months later, when the positions of secretary to the Congress and assistants were created, the army oaths were required for them, along with a promise of secrecy and an oath to “well and faithfully . . . execute the trust.”³⁸³ The same package of oaths was required for the office of secretary of the Committee of Secret Correspondence,³⁸⁴

³⁷⁹ In addition to the states discussed in *supra* notes 367–378 and accompanying text — Delaware, Maryland, Massachusetts, New York, Pennsylvania, and Vermont — all other states, with the exception of the “charter states” of Connecticut and Rhode Island, imposed the same requirements. See, e.g., GA. CONST. of 1777, § 19 (“The governor shall, with the advice of the executive council, exercise the executive powers of government, according to the laws of this state and the constitution thereof . . .”); *id.* § 24 (requiring the governor and president of the executive council to swear an oath: “to the best of my skill and judgment, execute the said office faithfully and conscientiously, according to law, without favor, affection, or partiality; that I will, to the utmost of my power, support, maintain, and defend the state of Georgia, and the constitution of the same; and use my utmost endeavors to protect the people thereof, in the secure enjoyment of all their rights, franchises and privileges; and that the laws and ordinances of the state be duly observed”).

³⁸⁰ 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 142, at 221.

³⁸¹ *Id.* at 223.

³⁸² 6 *id.* at 893–94.

³⁸³ 7 *id.* at 193–94.

³⁸⁴ *Id.* at 274.

filled in 1777 by Thomas Paine of *Common Sense* and *The American Crisis* fame.

In early 1778, the Congress enacted a long resolve reaffirming or updating many oaths. The oath for army officers remained essentially the same and was now also imposed on “all persons, holding any civil office of trust, or profit, under the Congress of these United States.”³⁸⁵ Additional promises were required of “every officer, having the disposal of public money,” to “faithfully, truly and impartially execute the office,” “render a true account,” and “discharge the trust reposed in me with justice and integrity.”³⁸⁶

As the war neared an end in 1781, the Congress began to reorganize itself to address deficiencies, particularly flaws in execution. The major executive-type offices frequently were bound by oaths of faithful execution. The Secretary of Foreign Affairs, a position filled by John Jay for several years, took an oath of fidelity to the United States and an oath “for the faithful execution” of his trust.³⁸⁷ The Agent of the Marine (a single officer replacing the previous multimember board handling naval affairs) took an oath “well and faithfully to execute the trust” and was required to be bonded “for the due and faithful performance of his office.”³⁸⁸ Finance officers took oaths “for the faithful execution of the trust reposed in them respectively.”³⁸⁹ The resolve creating the Post Office in 1782 required the Postmaster General and his deputies, clerks, and riders to swear to “well and faithfully do, execute, perform and fulfill every duty,” and subjected them to civil and criminal penalties for defaults.³⁹⁰ The Secretary of War, and his clerks and assistants, took an oath or affirmation of fidelity to the United States, to “support, maintain and defend” the United States, and to “faithfully, truly, and impartially execute the office.”³⁹¹ When the U.S. Mint was created in 1786, officers were required to enter into bonds “for the faithful execution of the trust respectively reposed in them.”³⁹²

There can be no doubt that the framers of the Constitution at Philadelphia in 1787 were intimately familiar with oaths of faithful execution. A great majority of the delegates must have taken such oaths, either

³⁸⁵ 10 *id.* at 115; *see also id.* at 114–16.

³⁸⁶ *Id.* at 116.

³⁸⁷ 19 *id.* at 44; *see also id.* at 43–44; 22 *id.* at 92. As Secretary of the Department, Jay wrote to Congress regarding negotiations of a treaty with Spain: “I know that it is with Congress to give Instructions, and that it is my Business faithfully to execute and obey them . . .” 29 *id.* at 629; *see also id.* at 627–29.

³⁸⁸ 21 *id.* at 920; *see also id.* at 919.

³⁸⁹ *Id.* at 950; *see also* 22 *id.* at 245 (similar oath for inspector charged with auditing the army).

³⁹⁰ 23 *id.* at 670–72.

³⁹¹ 28 *id.* at 23; *see also id.* at 22–23.

³⁹² 31 *id.* at 877.

for national, state, or local office, under the Crown or post-independence.³⁹³ Most of the delegates in Philadelphia had served in the Continental/Confederation Congress,³⁹⁴ a body very active in specifying that offices be faithfully executed. And resolves and draft resolves of the Congress imposing oaths of faithful execution were drafted or even directly penned by the hands of future Philadelphia Convention delegates Elbridge Gerry,³⁹⁵ Gouverneur Morris,³⁹⁶ John Rutledge,³⁹⁷ James Madison,³⁹⁸ Roger Sherman,³⁹⁹ Hugh Williamson,⁴⁰⁰ and John Dickinson.⁴⁰¹

* * *

In sum, we contend that late-eighteenth-century Anglo-Americans who were conversant in the language of law and government would have understood a legal instrument (such as Article II) that imposed an oath and command of faithful execution to be conveying three interrelated meanings: (1) diligent, careful, good faith, and impartial execution of law or office; (2) a duty not to misuse the office's funds or take unauthorized profits; and (3) a duty not to act *ultra vires*, that is, beyond the scope of one's office.

III. WHAT IT ALL MEANS: A FIDUCIARY THEORY OF ARTICLE II

Our history supports three core original meanings of the Constitution's commands of faithful execution. First, the Faithful Execution Clauses clarify how important it was to constitutional designers that the President stay within his authorizations and not act *ultra vires*. This meaning of the clauses may have implications for the relationship between the Executive and the legislature.⁴⁰² Second, the President is constitution-

³⁹³ See generally FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 1 (1985) ("[P]robably more Americans had participated directly in government at one level or another than had any other people on earth . . .").

³⁹⁴ *Id.* at 187.

³⁹⁵ 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 142, at 939 & n.1.

³⁹⁶ 11 *id.* at 784; *see id.* at 779 n.1.

³⁹⁷ 23 *id.* at 728.

³⁹⁸ *Id.*

³⁹⁹ 27 *id.* at 479–80 & 480 n.1.

⁴⁰⁰ *Id.* at 479–80.

⁴⁰¹ John Dickinson's Notes on Marine Affairs (Sept. 1779), in 13 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra*, at 599, 599–600; John Dickinson's Proposed Resolutions (July 9, 1779), in 13 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 170, 171–72 (Paul H. Smith ed., 1986).

⁴⁰² Because our view of the likely modest reach of the Executive Vesting Clause, *see* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."), is informed by Professor Julian Mortenson's recent historical support for a subordinate view of the Executive, *see* Mortenson, *supra* note 31, an *ultra vires* limitation embedded in the Faithful Execution Clauses implies a fair bit of legislative supremacy and executive deference to the work

ally prohibited from using his office to profit himself and engage in financial transactions that primarily benefit himself. Although the Compensation Clause⁴⁰³ and the Emoluments Clause⁴⁰⁴ in Article II (as well as the Foreign Emoluments Clause for all officers in Article I⁴⁰⁵) can be said to reinforce this intuitive conclusion, the history of the language of faithful execution suggests this reading, too. The faithful execution requirement in the Presidential Oath Clause, which appears right after the Compensation and Emoluments Clauses, may be seen, perhaps, as a belt-and-suspenders effort⁴⁰⁶ to help police conflicts of interests and proscribe self-dealing. More generally, faithful execution demands that the President act for reasons associated primarily with the public interest rather than his self-interest. Third, the Faithful Execution Clauses reinforce that the President must act diligently and in good faith, taking affirmative steps to pursue what is in the best interest of his national constituency. Whereas the prohibitions on self-dealing sound in proscription, the command of diligence, care, and good faith contain an affirmative, prescriptive component.

Our historical findings about the original meaning of the Faithful Execution Clauses align with core features of modern fiduciary law;

of Congress. However, we are mindful that Mortenson's findings are controversial. Specifically, some read the Executive Vesting Clause as a conferral of nearly royalist authority, given some framers' concerns about the corruption of Parliament and the need for a strong executive. *See generally* PRAKASH, *supra* note 17 (arguing for a more monarchical vision of the presidency conferred through the Executive Vesting Clause). Ultimately, we do not need to rely on one view of the Executive Vesting Clause to find that the Faithful Execution Clauses are their own hints that the Executive was designed to be substantively constrained. That is, even if the Article II Vesting Clause arms the President with some substantial powers beyond law execution, the Faithful Execution Clauses still subordinate the President, whose discretionary powers are limited by the authorizing document and entities like the legislature. That said, it seems to us rather unlikely that a super energetic executive was granted huge amounts of nearly kingly power only to be bound by an oath and command that was, as we show, usually imposed upon largely ministerial officials.

⁴⁰³ U.S. CONST. art. II, § 1 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . ."). Although Benjamin Franklin had wanted to take what he thought would be further anticorruption precautions by making the presidency an unpaid position to make sure no one was taking the job to enrich himself, *see* Journal of the Constitutional Convention (June 2, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 49, at 76, 77–78, 81–85, that view was obviously rejected in favor of an adequate salary to ensure the President's "vigor" and "independence" — and to protect against "weaken[ing] his fortitude by operating on his necessities" or "corrupt[ing] his integrity, by appealing to his avarice," THE FEDERALIST NO. 73, *supra* note 100, at 439–40 (Alexander Hamilton).

⁴⁰⁴ U.S. CONST. art. II, § 1 ("[A]nd he shall not receive within that Period any other Emolument from the United States, or any of them.").

⁴⁰⁵ *Id.* art. I, § 9.

⁴⁰⁶ On belt-and-suspenders in legal design, see Ethan J. Leib & James J. Brudney, *The Belt-and-Suspenders Canon*, 105 IOWA L. REV. (forthcoming 2020).

what the three meanings we can attribute to the Clauses have in common is that they are all part of the basic ways the private law constrains fiduciary discretion and power.

It is worth noting again a linguistic link between “faith” and “fiduciary.”⁴⁰⁷ Our historical account does not suggest that private fiduciary law was the background for Article II or that it was incorporated by reference. Although some fiduciary theorists of governmental authority have assumed that the framers of the Constitution drew upon prevalent private law ideas in fashioning their laws of public officeholding,⁴⁰⁸ our own evidence suggests something slightly different. As Part II demonstrates, the fiduciary-like obligations of officeholders have their roots in medieval and early modern England in a law of offices. This law of offices developed significantly during the seventeenth century, and did not seem to change dramatically over the eighteenth century, leading up to the revolutionary and framing periods. Most of the offices involved had a clearly public cast: sheriff, constable, tax assessor, customs officer, governor, and the like. But other offices looked like what we would now call private offices (yet in those days were set in motion by public laws).⁴⁰⁹ In either case, faithful execution duties applied to such offices. By contrast, the “private” fiduciary law we would recognize today does not seem to have crystallized until the early eighteenth century in England, and closer to the end of that century in America,⁴¹⁰ though its

⁴⁰⁷ See *supra* 2119 for a discussion of the Roman law origins of the concept.

⁴⁰⁸ See sources cited *supra* note 36.

⁴⁰⁹ A simple example is that corporate directors are paradigmatic private fiduciaries under modern law, of course; but because historically incorporation required the consent of a sovereign authority, corporate directors had something like quasi-public offices (and were routinely bound by oath and faithful execution duties). Another example might be guardians or trustees for the incompetent. Today, we would likely treat such guardians as private fiduciaries. But in the colonies, state legislatures would pass laws to install people in these offices. See, e.g., An Act to Appoint a Trustee to Take Care of the Person and Property of George Shipley, *reprinted in* MD. CHRON., Feb. 22, 1786.

⁴¹⁰ The seminal case for the fiduciary law of “private” offices is *Keech v. Sandford* (1726) 25 Eng. Rep. 223. This decision of the Court of Exchequer at Westminster cleanly and clearly imposed the basic no-conflict and no-profit proscriptions in a case concerning the law of private trusts. But by then the law of public office already had a deep concern with abuse of the public trust and corruption through self-dealing. Lord Chancellor King, who wrote the *Keech* opinion, was surely influenced by an earlier impeachment trial over which he had presided, which removed his predecessor, the Earl of Macclesfield. See *supra* notes 358–359 and accompanying text. And Lord Chancellor King is very likely to have been fluent in the political theory of John Locke, his cousin and routine correspondent for whom King served as a literary executor. Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, in *MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS* 577, 583–84 (Andrew Burrows & Alan Rodger eds., 2006). Locke is often credited as having laid out a fiduciary theory of governmental authority. See LOCKE, *supra* note 266. The relevant passages are discussed and analyzed in Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 714–15 (2013). It was not until seven decades after *Keech*, and some years after the U.S. Constitution was framed, that the House of Lords fully embraced the *Keech* principles. See *York Buildings v. Mackenzie* (1795) 3 Eng. Rep. 432, 446. More

early roots are many centuries older.⁴¹¹ So a fiduciary law of “private” offices was unlikely to have been plucked off-the-rack by the Philadelphia Convention drafters and applied to public offices. Instead, they applied the law of offices, which already contained what we might today call duties of loyalty and care. This suggests, then, not that the project of fiduciary constitutionalism is misguided — because something like core fiduciary obligations were imposed on the President by the Presidential Oath Clause and Take Care Clause — but that it needs to be revised to accommodate the fact that the fiduciary obligations entailed by the Faithful Execution Clauses flow at least as much from the law of public office as they do from inchoate private fiduciary law from England. Indeed, one might argue that what presents to us as private fiduciary law today had some of its genesis in the law of public officeholding. In the remainder of this Part, we will show how the three historical meanings of faithful execution provide insights about pressing contemporary debates on executive authority, even if they cannot alone dispose of those controversies.

A. *Ultra Vires Restrictions and Legislative Supremacy*

For centuries, commands and oaths of faithful execution established relational hierarchy — and subordinated an officeholder to a principal or purpose. Whether it was a command to trustees of a lottery⁴¹² or officers who kept almshouses for the poor,⁴¹³ faithful execution established relationships of commander and executor. Today, we might very well call such a mix of empowerment with office and subordination to

work is needed to understand when and how modern-looking fiduciary law fully crystallized in the United States.

We did, however, find a few references to faith and faithfulness in private fiduciary instruments in the records of the law practice of James Wilson, the primary drafter of the Faithful Execution Clauses. See, e.g., Last Will and Testament of Thomas Callahan, at 2 (Aug. 7, 1783) (Vol. 5, pp. 19–20) (unpublished James Wilson Papers, Box 13, Folder 4) (located at the Historical Society of Pennsylvania) (directing that the will be “well and faithfully to administer[ed]”); Will of Amos Strettell (Feb. 6, 1776) (Vol. 7, p. 126) (unpublished James Wilson Papers, Box 14, Folder 26) (located at the Historical Society of Pennsylvania) (“Alexander Willcocks will faithfully apply . . . as I may appoint and direct”); Will of Hugh Wright (Aug. 24, 1770) (Vol. 7, p. 128) (unpublished James Wilson Papers, Box 14, Folder 26) (located at the Historical Society of Pennsylvania) (“All things therein concerned be faithfully performed in every respect”).

⁴¹¹ See, e.g., David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1011–12 (2011).

⁴¹² See *supra* notes 319–320 and accompanying text.

⁴¹³ See *supra* note 328 and accompanying text.

principal or purpose fiduciary,⁴¹⁴ reinforcing another dimension of the fiduciary theory of Article II.⁴¹⁵

Others have argued that officeholding under the U.S. Constitution is sufficiently similar to a private law agency relationship⁴¹⁶ or is analogous to acting under a power of attorney,⁴¹⁷ and have found some historical sources that tend to strictly limit such actors to their authorizing instruments. Perhaps the most deliciously on-point piece of evidence is from an antifederalist writer, “A Citizen of Maryland”:

My idea of government . . . , to speak as a lawyer would do, is, that the legislatures are the *trustees* of the people, the constitution the *deed of gift*, wherein they stood seized to *uses* only, and *those uses being named*, they cannot depart from them; but for their due performance are accountable to those by whose conveyance the trust was made. The *right* is therefore *fiduciary*, the power *limited*⁴¹⁸

Indeed, the general legal idea that agents had an obligation to hew closely to their authorization and not veer outside it was well established in the common law at the time of the framing.⁴¹⁹ But where other fiduciary constitutionalists have struggled is in figuring out how to get from analogy to clear legal duty; the Faithful Execution Clauses and their history root the legal concern about acting *ultra vires* right in Article II — at least with respect to the President. Whatever else is true about the law of office, the Office of President explicitly requires faithful execution, subordinating the President to those who authorize what he is supposed to execute.

The reasonable legal implication here is that the language of faithful execution is for the most part a language of limitation, subordination, and proscription, not a language of empowerment and permission.⁴²⁰ Gaining the office is obviously a kind of empowerment that confers some important types of discretion specified by the settling instrument

⁴¹⁴ For the distinction between a “service” fiduciary like an agent for a principal and a “governance” fiduciary like a director of a charitable nonprofit that serves a purpose, see Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 519–27 (2015).

⁴¹⁵ Natelson finds the “[d]uty to [f]ollow [i]nstructions and [r]emain [w]ithin [a]uthority” to apply to all officeholders by virtue of them all being agents. Natelson, *The Necessary and Proper Clause*, *supra* note 36, at 57.

⁴¹⁶ See, e.g., Natelson, *The Public Trust*, *supra* note 36, at 1137–42. As we discuss *supra* note 402, even if the Vesting Clause grants powers, they are limited by the commands of faithful execution: hewing closely to authorizations, not pursuing self-interest, and acting only in good faith.

⁴¹⁷ See LAWSON & SEIDMAN, *supra* note 36, at 23–25.

⁴¹⁸ A Citizen of the State of Maryland, *Remarks Relative to a Bill of Rights*, reprinted in 17 DHRC, *supra* note 102, at 91, 92.

⁴¹⁹ See Natelson, *Judicial Review*, *supra* note 36, at 255–57.

⁴²⁰ Thus, Edward Corwin’s meditation on the presidential oath expends too much effort exploring potential powers conferred by the oath rather than limitations it imposes. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS*, 1787–1957, at 62–64 (4th ed. 1957).

of the U.S. Constitution, but that power and discretion are constrained by the oath and requirement of faithful execution.

This historical background may offer more weight in favor of executive deference to the legislature. As discussed above in section II.C.1, the royal coronation oaths did not include the word “faithfully” or its recurring synonyms. Stuart kings were made to swear an affirmative answer when asked: “will you, to your Power, cause Law, Justice and Discretion, in Mercy and Truth, to be executed to your Judgment?”⁴²¹ Neither faithfulness nor a synonym was added later by the Glorious Revolution Parliament.⁴²² A possible explanation is that the monarch did not — and indeed lawfully could not — personally execute the law but had to act only through the Crown’s courts of justice or ministers and administrators.⁴²³ The purely directing and superintending role in law execution perhaps did not require the strictures of faithfulness imposed on frontline law executors. We have seen, though, that privy councilors and the justices of the great royal courts at Westminster also did not pledge faithful execution in their oaths of office.⁴²⁴ It appears that it was lower-level, purely executive officials who were bound by this oath — officials who would have lacked any royal prerogative,⁴²⁵ have had relatively little discretion, and have been more hemmed in by a combination of law, oath, and superior direction. Seen in this light, the fact that the American President was required to swear or affirm

⁴²¹ THE HISTORY OF PUBLICK AND SOLEMN STATE OATHS, *supra* note 161, at 15.

⁴²² See An Act for Establishing the Coronation Oath 1688, 1 W. & M. sess. 1 c. 6, § 3 (“Will You to Your Power cause Law and Justice in Mercy to be Executed in all Your Judgments.”).

⁴²³ See, e.g., EDWARD BAGSHAW, THE RIGHTS OF THE CROWN OF ENGLAND AS IT IS ESTABLISHED BY LAW 105 (London, A.M. 1660) (stating that the English monarch “neither speaketh, nor acteth, nor judgeth, nor executeth, but by his Writt, by his Laws, by his Judges, and Ministers, and both these sworne to him to judge a right, and to execute justice to his People. For the King doth nothing in his own Person”); 1 BLACKSTONE, *supra* note 185, at *257 (“[F]or, though the constitution of the kingdom hath entrusted [the king] with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust . . .”); SIR MATTHEW HALE, THE PREROGATIVES OF THE KING, *reprinted in* 28 THE PUBLICATIONS OF THE SELDEN SOCIETY 106–07 (D.E.C. Yale ed., Selden Society 1976) (stating that the king’s council of “the great officers of state and justice” “are the distributors of the king’s judgment and will according to rule, for he neither speaks nor doth anything in the public administration of this realm but what he doth by these or some of these”).

⁴²⁴ See *supra* notes 185 & 187 and accompanying text.

⁴²⁵ Note that royal governors of North American colonies did, by delegation from the Crown and under the supervision of the Privy Council and later the Board of Trade, exercise some features of the prerogative such as “proroguing and dissolving assemblies” and “vetoing laws or suspending their operation.” JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 212 (1996). For a comprehensive review of the powers and supervision of colonial governors, see GREENE, *supra* note 302. Prior to the Glorious Revolution, some colonial governors were given the power to issue dispensations and indulgences to exempt select persons from Parliament’s penal laws targeting non-Anglican religious practice. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1428 (1990).

“faithful execution” suggests a constrained and republican rather than imperial and regal view of that office. This textual choice is consistent with recent work suggesting that the presidency does not implicitly include broad royal prerogative powers,⁴²⁶ and it is one counterweight to recent historical and legal claims about the royalism of the presidency and the Founding era.⁴²⁷

A counterargument may be that while the coronation oaths lacked the word “faithfully” and its synonyms, the post-Glorious Revolution coronation oaths offered an even more explicit commitment to legislative power than the Article II oath: “Will You solemnly Promise and Swear to Governe the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same? . . . I solemnly Promise soe to doe.”⁴²⁸

If the framers had wanted an explicit command to always abide by Congress’s laws, they had the language of these coronation oaths available. But the absence of such language in Article II probably should not be viewed as surprising or as giving rise to a negative inference in favor of a President’s freedom to defy statutory law for policy reasons. That a chief magistrate of a republican government lacked authority to dispense with the application of law to particular individuals, or to suspend law entirely, was so thoroughly settled in Anglo-American constitutional law by the Glorious Revolution and its aftermath that the principle most likely would have gone without saying.⁴²⁹ Only a few of the early U.S. state constitutions expressly barred suspensions and dispensations, but that was not understood in the other states to leave the governors free to do so.⁴³⁰ And in any event, the faithful execution language conveyed this idea.

Over the past few decades, there has been increasing debate about the President’s power of nonenforcement,⁴³¹ disregard,⁴³² or waiver (even “Big Waiver”⁴³³) of statutes. Examples include: the increasing use

⁴²⁶ See Mortenson, *supra* note 31 (manuscript at 5).

⁴²⁷ See sources cited *supra* note 31.

⁴²⁸ An Act for Establishing the Coronation Oath 1688, 1 W. & M. sess. 1 c. 6, § 3.

⁴²⁹ See PRAKASH, *supra* note 17, at 93 (“By the late eighteenth century, few would have thought that chief executives could exercise [suspension or dispensation] powers without a statutory delegation or a specific grant of constitutional authority. After all, the Crown had lacked these powers for almost a century.”).

⁴³⁰ *Id.* at 93–94.

⁴³¹ See, e.g., Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1591–95 (2007); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 8–14 (2000).

⁴³² See, e.g., Prakash, *supra* note 3, at 1615–18.

⁴³³ See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 267 (2013).

of presidential signing statements;⁴³⁴ President Bush's "deregulation through nonenforcement;"⁴³⁵ President Obama's delays of provisions of the Affordable Care Act (ACA);⁴³⁶ his waiver of aspects of welfare laws and the No Child Left Behind Act;⁴³⁷ his nonenforcement of marijuana offenses;⁴³⁸ and his policy of nonenforcement of some immigration laws.⁴³⁹ More recently, the Trump Administration has declined to enforce the individual mandate and other provisions of the ACA.⁴⁴⁰ Our lessons about the original meaning of faithful execution might illuminate these contested areas of executive authority.

There are perhaps four categories of executive nonenforcement: non-enforcement for policy reasons (suspensions or dispensations in English legal history), inability to enforce because of budgetary limitations or unclear congressional commands, nonenforcement for constitutional reasons, and prosecutorial discretion.⁴⁴¹ The historical evidence in this Article does not conclusively address the legitimacy of all of these powers, but it provides some clues.

Nonenforcement for policy reasons sits most at odds with the historical meaning of the Faithful Execution Clauses. Faithful execution was understood as requiring good faith adherence to and execution of national laws, according to the intent of the lawmaker. Waivers or refusals to enforce for policy reasons without clear congressional authorizations, then, appear to be invalid under the clauses.

By contrast, inability to enforce a congressional command because the command is essentially unfunded or is too vague to be enforced does not seem obviously implicated by our findings. Thus, the Supreme Court's willingness to defer to executive discretion in "failure to act" claims under the Administrative Procedure Act⁴⁴² (APA) in those cases

⁴³⁴ See Daniel B. Rodriguez et al., *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95, 100–01 (2016).

⁴³⁵ See Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010).

⁴³⁶ See Simon Lazarus, *Delaying Parts of Obamacare: "Blatantly Illegal" or Routine Adjustment?*, THE ATLANTIC (July 17, 2013), <https://www.theatlantic.com/national/archive/2013/07/delaying-parts-of-obamacare-blatantly-illegal-or-routine-adjustment/277873/> [<https://perma.cc/43S2-X28K>].

⁴³⁷ See Martha Derthick & Andy Rotherham, *Obama's NCLB Waivers: Are They Necessary or Illegal?*, EDUC. NEXT, Spring 2012, at 57; Molly Ball, *What Obama Really Did to Welfare Reform*, THE ATLANTIC (Aug. 9, 2012), <https://www.theatlantic.com/politics/archive/2012/08/what-obama-really-did-to-welfare-reform/260931/> [<https://perma.cc/WGB2-UJ2N>].

⁴³⁸ See Price, *supra* note 26, at 757–59.

⁴³⁹ See Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96, 96–97 (2015); Blackman, *supra* note 68, at 216–19.

⁴⁴⁰ Nicholas Bagley & Abbe R. Gluck, Opinion, *Trump's Sabotage of Obamacare Is Illegal*, N.Y. TIMES (Aug. 14, 2018), <https://nyti.ms/2Z5gwTb> [<https://perma.cc/AX9F-QG5L>].

⁴⁴¹ A fifth might be nonspending of appropriated funds on policy grounds. Because there could be unique constitutional considerations about the roles of the legislature and the Executive in spending decisions, we will not offer an opinion about the issue here.

⁴⁴² See 5 U.S.C. § 706(1) (2012) (providing courts the power to "compel agency action . . . withheld").

of underfunding, imprecision, or lack of specificity by congressional command is consistent with the history of faithful execution.⁴⁴³ So too is judicial deference to interstitial executive interpretation of ambiguous statutes in run-of-the-mill *Chevron* cases, in which courts allow the Executive a range of discretion to develop statutory meaning in cases where Congress has not clearly spoken on the matter.⁴⁴⁴ Although faithful execution does seem to require the Executive to follow *in good faith* what he takes to be Congress's instructions,⁴⁴⁵ there obviously remains an area of discretion in cases where Congress does not provide adequate funding or guidance.⁴⁴⁶ Indeed, the faithful execution command is imposed precisely because the President retains plenty of discretion in his office — and the framers worried about when that discretion could too easily bleed into ultra vires action.

Many supporters of a purported presidential power not to enforce a command based on his own interpretation of the Constitution rely on the presidential oath to “faithfully execute” the office and to “preserve” the Constitution.⁴⁴⁷ The reliance on faithful execution for a theory of “departmentalism” in which each branch gets its say on the meaning of the Constitution, however, may be misplaced. In light of our evidence that oaths in general — and the faithful execution command in particular — tended to limit rather than enlarge an official's power and discretion, and that faithful execution obligations were often required of mid- and lower-level officials who would not plausibly be thought to have many (or any) legal rights of nonenforcement, the record we uncovered cuts against presidential nonexecution on the basis of independent constitutional interpretation. Indeed, our history seems like a thumb on the scale in favor of the view that the President must carry out federal statutes.⁴⁴⁸ That said, resolving this issue definitively would seem to require knowing whether the Constitution is part of “the Laws” that

⁴⁴³ See, e.g., *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66–67 (2004).

⁴⁴⁴ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). Although *Chevron* did not cite the command of faithful execution, some courts have rooted the Executive's power to interpret ambiguous statutes in the Take Care Clause. See, e.g., *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 515 (9th Cir. 2012).

⁴⁴⁵ See Aaron Saiger, *Agencies' Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231, 1253 (2016).

⁴⁴⁶ *Myers v. United States*, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting) (“Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress . . . declines to make the indispensable appropriation. . . . The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.”).

⁴⁴⁷ See, e.g., Paulsen, *supra* note 3, at 257–62.

⁴⁴⁸ See *supra* notes 121–124 and accompanying text (discussing James Wilson and presidential nonenforcement).

must be faithfully executed by the President, a point on which we remain unsure as a matter of the historical record up through 1788.⁴⁴⁹

Does our evidence address prosecutorial discretion? What if an administration adopts a broad policy of prosecutorial discretion as a means of nonenforcement, triggering concerns about faithful execution? The historical evidence here does not answer such a question definitively, but it does offer some support for the argument against systematic executive discretion to effectively “suspend” laws through an assertion of categorical prosecutorial discretion.⁴⁵⁰

As the Supreme Court has acknowledged, quoting the Take Care Clause, “[u]nder our system of government, Congress makes laws and the President . . . ‘faithfully execute[s]’ them.”⁴⁵¹ The Faithful Execution Clauses thus underscore that “[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts.”⁴⁵² This lesson is as basic as it is relevant to contemporary disputes about presidential power to undermine Obamacare without a congressional repeal;⁴⁵³ presidential power to underenforce congressional regulation of marijuana;⁴⁵⁴ and presidential power to underenforce or overenforce immigration laws.⁴⁵⁵ It may also be relevant to controversial case law on standing, which has relied on the idea of faithful execution to question the ability of Congress to write citizen suit provisions in its laws to help vindicate the “public interest” through “individual right[s]” to bring lawsuits against the Executive.⁴⁵⁶ Although *Lujan v. Defenders of Wildlife*⁴⁵⁷ clearly suggested this kind of congressional action to be in tension with “the Chief Executive’s most

⁴⁴⁹ See *supra* section I.D.2, pp. 2136–37.

⁴⁵⁰ One might further ask whether our evidence helps analyze recent presidential choices to enforce congressional laws but not defend them in court. See generally Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 *FORDHAM L. REV.* 619 (2012) (exploring and defending the Obama Administration’s policy to enforce the Defense of Marriage Act but not defend it in courts as a form of “faithful execution”). As a matter of original meaning, the “enforce but not defend” strategy, *id.* at 639, seems consistent with the core requirements of faithful execution as they would have been understood at the time of the framing.

⁴⁵¹ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (alteration in original) (quoting U.S. CONST. art. II, § 3).

⁴⁵² *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) (Day, J., dissenting).

⁴⁵³ See, e.g., Complaint for Declaratory and Injunctive Relief at 6–7, *City of Columbus v. Trump*, No. 18-cv-2364 (D. Md. Aug. 2, 2018), 2018 WL 3655066 (citing the President’s duty of faithful execution in suit by cities trying to enjoin presidential efforts to undermine the ACA).

⁴⁵⁴ See, e.g., Price, *supra* note 26, at 757–59.

⁴⁵⁵ See, e.g., Brief for the Cato Institute, Professor Randy E. Barnett, and Professor Jeremy Rabkin as Amici Curiae Supporting Respondents at 10, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (“It bears emphasis how strong the language of the Take Care Clause is. It is pitched at the highest register of constitutional obligation. The president *shall* — not may. He shall *take care* — not merely attempt. . . . And he shall take care that they are executed *faithfully*. No other constitutional provision mandates that any branch execute a power in a specific manner.”).

⁴⁵⁶ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

⁴⁵⁷ 504 U.S. 555.

important constitutional duty, to ‘take Care that the Laws be faithfully executed,’”⁴⁵⁸ that suggestion looks less convincing in light of our findings here about the relational structure imposed by faithful execution.

B. The President’s Duty of Loyalty Against Self-Dealing

Our findings vindicate what we have previously called the “fiduciary reading . . . of Article II”⁴⁵⁹ because the three major propositions we identify as the substantive original meaning of faithful execution — a subordination of the President to the laws, barring ultra vires action; a no-self-dealing restriction; and a requirement of affirmative diligence and good faith — taken together reflect fundamental obligations that are imposed upon fiduciaries of all kinds.⁴⁶⁰

What then can it mean to say that the Faithful Execution Clauses evidence what we would now see as fiduciary law’s primary concern to avoid conflicts of interest and the misappropriation of profits?⁴⁶¹ It cannot mean, for example, that as a matter of original meaning, presidents are disabled from campaigning for their own reelections. Nor can it mean that they are prohibited from trying to help the fate of their political parties, even though presidents do of course have important personal stakes in party success. But it still is likely to have constitutional relevance that has been underappreciated because the history of the Faithful Execution Clauses has not heretofore been known.

First, the Faithful Execution Clauses reinforce that “presidential actions motivated by self-protection, self-dealing, or an intent to corrupt . . . the legal system are unauthorized by and contrary to Article II of the Constitution.”⁴⁶² In light of the framers’ preoccupation with corruption, taking bribes, and the misappropriation of financial resources by officeholders,⁴⁶³ it is no surprise that they sought to bind the President to a requirement of faithful execution. That is how the law of office for centuries — sometimes with more success than others — sought to constrain officeholders’ self-dealing. As we show in Part II, oaths and commands of faithful execution were often paired with requirements of

⁴⁵⁸ *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

⁴⁵⁹ Kent, Leib & Shugerman, *supra* note 21.

⁴⁶⁰ See Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE*, *supra* note 36, at 84, 107; see also Leib & Galoob, *supra* note 35, at 313–15.

⁴⁶¹ See MATTHEW CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* 39–40 (2010).

⁴⁶² *Law Professor Letter on President’s Article II Powers*, PROTECT DEMOCRACY (June 4, 2018), <https://protectdemocracy.org/law-professor-article-ii/> [<http://perma.cc/6VU6-SF6Y>].

⁴⁶³ This republican concern of the framers has been widely discussed in, inter alia, BAILYN, *supra* note 7, at 130–31; ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* 37–38 (2014); WOOD, *supra* note 7, at 144.

bonds or sureties.⁴⁶⁴ In our view, the lack of any similar requirement in Article II does not undermine our claim that the President is barred from financial self-dealing. An anticorruption reading is supported by the choice to pay the President with a salary set by law and to bar the President from taking other emoluments.⁴⁶⁵ Since the President, unlike many Anglo-American officers, would not directly collect revenue himself and would not be paid by fees for services rendered to the public — two features of some offices that encouraged corruption⁴⁶⁶ — bonding or surety requirements were probably superfluous.

There is a reasonable question about how we can link “faithfulness” to a no-self-dealing limitation, given its use during eras when offices were clearly bought and sold and holding an office was a lucrative business. The impressive works of both Professor G.E. Aylmer and Professor Nicholas Parrillo have explored the ways offices could easily serve to enrich their holders.⁴⁶⁷ But this institutional context simply underscores the importance of a “faithfulness” limitation. Because so many offices were premised on fees and profit motives, it was all the more difficult to regulate the line between legitimate and permissible profits versus exploitative self-dealing. A “faithfulness” oath was one tool the English and colonials used to police those abuses in an era of office profiteering.

It may be, secondarily, that the President’s duty of faithful execution limits some of his other powers in Article II that otherwise look discretionary. For example, notwithstanding that the President is empowered by the Constitution to be the “Commander in Chief” with no reservations in Article II, Section 2, the presidential oath of faithful execution in Article II, Section 1 probably prohibits him as a matter of original meaning from choosing defense contractors that line his own personal pockets in derogation of the public interest. The seemingly plenary pardon power in Section 2 may similarly be curtailed by the duty of faithful execution, prohibiting (at least) self-pardons.⁴⁶⁸ And it may also restrict the President’s power to dismiss officials for primarily self-protective

⁴⁶⁴ See *supra* section II.D.3, pp. 2165–68.

⁴⁶⁵ U.S. CONST. art. II, § 1.

⁴⁶⁶ See *supra* notes 209–211 & 255 and accompanying text. Professor Nicholas Parrillo has recently explored these dynamics. See generally PARRILLO, *supra* note 250, at 111–24. It seems to us that Parrillo’s recent effort to apply the lessons of his findings to “fiduciary thinking about public office,” Nicholas R. Parrillo, *Fiduciary Government and Public Officers’ Incentives*, in FIDUCIARY GOVERNMENT 146, 146 (Evan J. Criddle et al. eds., 2018), too quickly assumes that without “salarization,” we cannot have officeholders with fiduciary obligations, see *id.* at 152. Just because an officer has incentives for self-dealing does not mean she is not a fiduciary. Indeed, it is precisely the poor incentives for self-control and the difficulty of monitoring officer performance that often serve as the justification for strict fiduciary obligations in the first place. See Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking — Some Theoretical Perspectives*, 80 NW. U. L. REV. 1, 4–5 (1985).

⁴⁶⁷ See *supra* notes 248–250 & 255 and accompanying text.

⁴⁶⁸ See sources cited *supra* notes 21–22.

purposes against the public interest, especially given that removal power is not explicitly mentioned in the text, while the requirement of faithful execution is, doubly.⁴⁶⁹

Ultimately, our effort here is not to develop clear rules of constitutional law. But the finding of a fiduciary duty of loyalty in the Faithful Execution Clauses is an important development and must be considered along with other modalities of constitutional interpretation in finding answers to pressing modern problems.⁴⁷⁰ We do not opine here on the way the framers envisioned enforcing the President's duty of loyalty and avoiding self-dealing. But certainly impeachment was a common method to enforce public fiduciary obligations, and one featured prominently in the U.S. Constitution.⁴⁷¹

C. *The President's Affirmative Obligation of Diligence*

Our historical findings in Part II revealed not only proscriptive dimensions of the duty of faithful execution but prescriptive ones as well. Considering the meanings of faithfulness disclosed by dictionaries at the time of the framing, we were able to highlight that faithful execution requires not only the absence of bad faith through honesty⁴⁷² but also the presence of forms of "steadiness." The implication here is that faithful execution requires affirmative effort on the part of the President to pursue diligently and in good faith the interests of the principal or purpose specified by the authorizing instrument or entity. This is in keeping with many conceptions of fiduciary obligations, which treat loyalty and care as forming the core of fiduciary obligation.⁴⁷³ And this makes sense of why, although the standard of review for executive inaction is very deferential (as we just discussed), the APA does make inaction reviewable: diligence will often require action to be compelled.

⁴⁶⁹ See Leib & Shugerman, *supra* note 22; Shugerman & Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing his Pardon Power*, *supra* note 21.

⁴⁷⁰ Natelson's fiduciary constitutionalism applies similar fiduciary obligations to many other governmental actors. See Natelson, *The Public Trust*, *supra* note 36, at 1146–58. But our argument here flows from the Faithful Execution Clauses, which apply only to the President. This does not mean other officeholders are not also bound by fiduciary obligations of loyalty. But, based on the historical findings we report here, the Constitution clearly imposes this set of fiduciary obligations on the President in Article II.

⁴⁷¹ See, e.g., Robert G. Natelson, *Impeachment: The Constitution's Fiduciary Meaning of "High . . . Misdemeanors,"* 19 FEDERALIST SOC'Y REV. 68, 68–69 (2018). There is evidence for many different enforcement mechanisms, even if impeachment is the most obvious and salient in the historical materials.

⁴⁷² See generally Pozen, *supra* note 3.

⁴⁷³ To be sure, some see only the duty of loyalty at the core and the duty of care as a sideshow. See CONAGLEN, *supra* note 461, at 59 (noting the common view that "fiduciary duties are proscriptive rather than prescriptive"). But most conventional approaches to fiduciary obligation mention the duty of care as among the most common of fiduciary duties. See, e.g., Stephen R. Galoob & Ethan J. Leib, *The Core of Fiduciary Political Theory*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 401, 404–05 (D. Gordon Smith & Andrew S. Gold eds., 2018).

What might this command mean for constitutional law? It likely means that when the Executive acts or refrains from acting, he must be motivated by the right kinds of reasons.⁴⁷⁴ Not only is the proscription on self-dealing relevant, but the Executive must also ensure (“take Care”) that anyone under his command in the business of executing the law is doing so only in the best interests of his national constituency. Thus, the Faithful Execution Clauses do ultimately have lessons for how the administrative state must be run as a constitutional matter (if original meaning is relevant here): the President as the head of the executive branch needs to follow the commands of Congress at the same time as he diligently ensures that the entire apparatus of the office and the executive branch is properly oriented in a steadfast and steady manner.⁴⁷⁵ It is a derogation of duty not to pursue with diligence what Congress wants executed and that which is in the public interest.⁴⁷⁶ Although the President, like all fiduciaries, has significant discretion, there is still an affirmative obligation not to abuse discretion to fail to pursue or act against the beneficiary’s best interests.

The constellation of proscription and prescription that our history reveals also means that there is likely an interstitial duty traceable to the obligation of diligence — something like a President’s completion authority — that the Faithful Execution Clauses support.⁴⁷⁷ This limited affirmative prescription gives the President authority to fill in incomplete legislative schemes to promote the best interests of the people, the ultimate beneficiaries of his fiduciary obligation, whose interests are usually mediated through their representatives.

CONCLUSION

The Constitution’s twin clauses in Article II that require faithful execution from the President are the sources of a lot of rhetoric in law and politics. Much of that rhetoric gives the impression that the Faithful Execution Clauses confer upon the President immense, discretionary powers that consolidate substantial authority within the executive

⁴⁷⁴ On the role of the right kinds of reasons in analyzing a fiduciary’s conduct, see Galoob & Leib, *supra* note 473, at 409–10.

⁴⁷⁵ The fiduciary theory of administrative governance, see generally Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006), gains further support from our historical findings about the Faithful Execution Clauses.

⁴⁷⁶ The focus on the public interest is something generations of “republicans” have also traced to the framing period. See JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* 165 (1992) (“Because of the critical importance of virtue [to republican ideology], the proponents of the mixed constitution analyzed the ways to enhance men’s capacity to place the public weal before their own self-interest.”).

⁴⁷⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 701–04 (1952) (Vinson, C.J., dissenting); Goldsmith & Manning, *supra* note 15, at 2303–04. Both sources allude to the Take Care Clause in their arguments for something like a “completion power” but neither supports their view with the original meaning of “faithful execution” we develop here.

branch. We have shown here that this rhetoric is radically disconnected from centuries of history that furnish a rather different substantive set of meanings to the Faithful Execution Clauses. That history points to faithful execution being a restrictive duty rather than an expansive power — and this requirement was as likely to be imposed on high-level officeholders as it was upon low-level officers, who were ordered not to veer from their assigned jobs, not to self-deal, and to do their jobs with diligence and care. This tripartite specification of faithful execution, tracking emerging fiduciary law, was well understood by the time of the framing of the U.S. Constitution.

The original meaning of the Faithful Execution Clauses does not cleanly dispose of many of the most significant and pressing contemporary issues implicated by assertions of presidential authority. But our findings here at least suggest that the President — by original design — is supposed to be like a fiduciary, who must pursue the public interest in good faith republican fashion rather than pursuing his self-interest, and who must diligently and steadily execute Congress's commands.⁴⁷⁸ Now that this original meaning is more clear, the Constitution can be applied more faithfully to the vision of the framers.

⁴⁷⁸ For an effort to link republicanism and fiduciary theory, see Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993 (2017). Our Article shows these connections as a matter of constitutional history.